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OF

GEORGE GORDON'S

PETITION FOR PARDON.

JOHN JOLLIFFE, COUNSEL FOR PETITIONER.

CINCINNATI:

GAZETTE COMPANY STEAM PRINTING HOUSE, FOURTH AND VINE STS.

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INTRODUCTION.

After nearly all of the following argument was in type, and while the last pages of it were in the hands of the printer, the telegraph brought the pleasant news that the President had pardoned Rev. George Gordon. It is to be regretted that he did not place his pardon upon the ground that the acts of Congress in question are null; but still, an honest, upright man has been released from an imprisonment which shows what terrible inroads the system of slaveholding has made upon the people of the United States; so that, even in Northern Ohio, a citizen has been imprisoned, for his faithfulness to the Constitution,—to Liberty,—and to God.

This morning's newspaper brings the following:

[Special Dispatch to the Cincinnati Gazette.]

WASHINGTON, April 4, 1862.

MR. GORDON'S PARDON.

"The following is a copy of the free pardon granted Rev. George Gordon, President of Iberia, Ohio, College:

"WHEREAS, On the sixth of November, 1861, in the District Court of the United States for the Northern District of Ohio, one George Gordon was indicted and convicted for the violation of the Fugitive Slave Law, to-wit: of resisting a process in the hands of the Deputy Marshal in his attempt to arrest a fugitive slave, and was sentenced by the Court to six months' imprisonment, and to pay a fine of three hundred dollars, with costs of prosecution; and

"WHEREAS, It is creditably represented that George Gordon did not participate in the incitement and the origin of the riotous proceedings, and was not otherwise guilty than that, near the end of the scene, he did encourage and support a riotous breach of the law, by his presence and consent; and whereas, considering his reverend calling as a minister of the gospel, his reputation for piety,

learning and talents, and the high estimation in which the President is credibly informed he is held by the community which knows him best, it does appear to the President that his sentence, though legal, was severe, and by his imprisonment and suffering he has atoned sufficiently for his offence, and that in his case the law has been vindicated."

By the assertion that "his sentence, though legal, was severe;" the President has thrown the whole weight of his official influence in favor of the validity of the Fugitive Slave Acts of 1793 and 1850, and as an inevitable consequence against MAGNA CHARTA and the guarantee of RELIGIOUS FREEDOM. That he has done so without any evil purpose, is no doubt true; but the fact that on, the 4th of April, 1862, a President of the United States has done so, shows how necessary and proper it is that the questions involved in the discussions upon the constitutionality of the Acts of Congress in question, should be more widely canvassed, and better understood. In the hope that the argument, intended to have been presented to the President in that matter, may still be useful, it is now published, with all the imperfections of a hasty preparation of it upon it.

Hundreds of excellent and intelligent citizens believe those acts are valid laws; but such opinions will be removed by careful and fair examination, and it will be found that the Constitution is the ally of Liberty, and the foe of all oppression.

IN THE MATTER OF

GEORGE GORDON'S PETITION FOR PARDON.

To his Excellency, ABRAHAM LINCOLN, *President of the United States:*

SIR: Rev. George Gordon, a citizen of the United States, at the November term of the District Court of the United States for the Northern District of Ohio, was tried and convicted on a charge,—the nature and extent of which will more fully appear from a copy of the indictment against him, as follows:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO.

In the District Court of the United States for the Northern District of Ohio, of the November Term, A. D. 1860

The Grand Jurors of the United States of America, within and for the district aforesaid, upon their oaths, present and find that, heretofore, to wit, on the nineteenth day of September, in the year of our Lord one thousand eight hundred and sixty, to wit, at Cincinnati, in the State of Ohio, a certain legal writ and process, directed to the Marshal of the United States within and for the Southern District of Ohio, or any of his lawful deputies, was legally awarded and issued, by and under the hand and seal of Edward R. Newhall, then and there a United States Commissioner, appointed by the Circuit Court of the United States of the Seventh Judicial Circuit and Southern District of Ohio, and who, in consequence of such appointment, was then and there authorized to exercise the powers that any Justice of the Peace or other magistrate of any of the United States could, or might exercise in respect to offenders, for any crime or offence against the United States, by arresting, imprisoning or bailing the same, under and by

virtue of the 33d section of the act of the 24th of September, 1789, entitled "An Act to establish the Judicial Courts of the United States," which said legal writ and process was then and there duly delivered to Joseph S. Barber, who was then and there an officer of the United States, namely, Deputy Marshal of the United States for the Southern District of Ohio, to wit, on said nineteenth day of September, in the year aforesaid, and was of the purport and effect following, that is to say:

"UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
CITY OF CINCINNATI.

"*The President of the United States, to the Marshal of the United States, within and for the Southern District of Ohio, or any of his lawful Deputies, Greeting:*

"Whereas, complaint has this day been made before me, Edward R. Newhall, a United States Commissioner, appointed by the Circuit Court of the United States, of the Seventh Judicial Circuit, and Southern District of Ohio, upon the oath of Isaac Pollock, that Grandison Martin, a person owing service and labor to the said Isaac Pollock, in the State of Kentucky, and under the laws of the said State, did, on or about the fifth day of May, A. D. 1860, escape from the service of the said Isaac Pollock, at Germantown, in Mason County, in the State of Kentucky, and from and out of the State of Kentucky, and into the State of Ohio, without the knowledge or consent of the said Isaac Pollock. These are, therefore, to command you, in the name and by the authority aforesaid, to take the said Grandison Martin, if he be found within the State of Ohio, or if he shall have fled, that you pursue after him into any other District, and take and safely keep him so that you have his body forthwith before me, to answer the said complaint and be further dealt with according to law. Given under my hand and seal, in the City of Cincinnati, this 19th day of September, A. D. 1860.

{SEAL.}

EDWARD R. NEWHALL,
United States Commissioner.

And the Jurors aforsaid do further present and find that the said legal writ and process, duly awarded, issued and delivered, as aforesaid, afterwards, to wit, on the twentieth day of September, in the year of our Lord one thousand eight hundred and sixty, at the County of Morrow, in the Northern

District of Ohio, and within the jurisdiction of this Court, the said Joseph S. Barber, then and there still continuing and being an officer of the United States, to wit, Deputy Marshal of the United States for the said Southern District of Ohio, attempted to serve and execute the said legal writ and process in manner and form as he was therein commanded; and that George Gordon, Richard Hammond, Calvin Boland, James Hammond and John Hammond, with divers other persons, to the Grand Jurors aforesaid unknown, being then and there, to wit, at said County of Morrow, in the Northern District of Ohio, and within the jurisdiction of this court, well and truly informed of the premises, then and there, to wit, on the day and year last aforesaid, at the District and within the jurisdiction last aforesaid, unlawfully, with force and arms, did knowingly and wilfully obstruct, resist and oppose the said Joseph S. Barber, then and there being, to wit, at the District, and within the Jurisdiction last aforesaid, on the said twentieth day of September, in the year aforesaid, an officer of the United States as aforesaid, to wit, Deputy Marshal of the United States for the said Southern District of Ohio, in attempting as aforesaid, at said County of Morrow, in the Northern District of Ohio, and within the jurisdiction of this Court, on the day and year last aforesaid, to serve and execute the aforesaid legal writ and process, in manner and form as was therein commanded; to the great damage of the said Joseph S. Barber, to the great hindrance and obstruction of justice, and to the evil example of the citizens of the United States; contrary to the form of the act of Congress, in such case made and provided, and against the peace and dignity of the United States.

G. W. BELDEN, *U. S. Attorney.*

He was convicted and sentenced to be imprisoned for six months in the jail of Cuyahoga county, Ohio, and to pay a fine of three hundred dollars, and the costs of prosecution. He is now in jail in Cleveland, Ohio, under sentence. The fine and costs are unpaid.

The petitioner is a member of the Free Presbyterian Church; a religious body that has separated from the Presbyterian Church of the United States upon the ground that slave-holding is a sin, and that all persons who wilfully aid, abet, or assist others in slave-holding, sin, in doing so.' He is a minister of that church and president of Iberia College, situated in Ohio.

He cannot bring a writ of error or other process to reverse

this judgment against him, because the laws of the United States do not provide for such process in criminal cases. [See Gordon *vs.* United States, at December Term, 1862.] He must therefore be released by pardon, or endure the sentence of the court.

That he may not be misunderstood, he CLAIMS a pardon exclusively upon the ground that the acts of Congress under which he is convicted are utterly null and void; because they are contrary to the Constitution of the United States. He is NOT willing to receive a pardon upon any other ground. He makes no plea of penitence, no promise of amendment; he is not an applicant for mercy,—still less for favor. He does not wish the President, from any motive of pity or compassion, to pardon him at the expense of public justice, or of the Constitution of the United States; but, on the contrary thereof, he now claims pardon as a matter of RIGHT, and not as a favor.

All that he asks of you is, that you will carefully read his petition, and the accompanying documents, and then, that *you be faithful to your oath;* and will, to the best of your ability, *preserve, protect, and defend the Constitution of the United States.*" He asks no more.

Placing his petition solely upon the ground that the acts of Congress, to which he will invite your attention, are mere nullities, it is right and respectful to the President that your petitioner show you how and why the acts of Congress in question are null; and wherein they are contrary to the Constitution of the United States; for which purpose he has employed counsel, who now submits this argument to your consideration:

First. The indictment charges that "Edward R. Newhall, then and there a United States commissioner, appointed by the Circuit Court of the United States, for the Seventh Judicial Circuit and Southern District of Ohio," issued his warrant which is set out in full in the indictment, the caption of which warrant is:

United States of America, Southern District of Ohio, City of Cincinnati.

This is referred to for the purpose of showing that the warrant was issued within the limits of *a state*, (and not in the District of Columbia, or in a territory;) that it was issued in the city of Cincinnati, and within the State of Ohio.

The warrant charges, that complaint has been made before Edward R. Newhall, a commissioner of the United States, appointed by the Circuit Court of the United States, for the Seventh Judicial Circuit and Southern District of Ohio, upon the oath of Isaac Pollock, that Grandison Martin, a person

owing service and labor to the said Isaac Pollock, in the State of Kentucky, and under the laws of said state, did on, &c., escape from the service of the said Isaac Pollock, * * from and out of the State of Kentucky, and into the State of Ohio.

And it commands the officer to whom it is directed, to take the said Grandison Martin, * * and have his body forthwith before (said Newhall) "to answer the said complaint, and be further dealt with according to law."

This writ, it is charged in the indictment, was placed for service in the hands of a deputy (United States) marshal for the Southern District of Ohio, and at Morrow County, in the Northern District of Ohio, the petitioner, with others, hindered and prevented the officer from serving it.

For this he was indicted and convicted; for this he is imprisoned, and fined, and adjudged to pay the costs of prosecution.

The act of Congress that the petitioner is charged to have violated is found on page 76 of Dunlop's Laws of the United States, section 22, as follows:

"That if any person or persons shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States in serving or attempting to serve or execute any mesne process, or warrant, or any rule, or order of any court of the United States, or any other legal or judicial process whatsoever, or shall assault, beat, or wound any officers or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant aforesaid; every person so knowingly and wilfully offending in the premises, shall on conviction thereof, be imprisoned, not exceeding twelve months, and fined, not exceeding three hundred dollars."

If the warrant set out in the indictment was the legal process of any court, officer, or person who, by the laws of the United States, could lawfully issue such warrant, then the application for pardon fails; but, if that warrant was wholly null and void—if Edward R. Newhall, Esq., commissioner, had no right, power, or authority to issue it—and still more, if it shall be found that it was not merely null, but worse than a nullity, an open and flagrant violation of the Constitution of the United States — then the petitioner should be instantly pardoned, because he is unlawfully imprisoned, and that, too, by the very government that is bound to protect him. And if that government shall proceed to collect the fine and costs in this case, it will be a robber—a robber of one of its own citizens—under color of law.

If these assertions are true—no one will doubt for an instant, but that it is the DUTY of the President to pardon the petitioner.

The powers of the government of the United States are, by the Constitution, divided into Legislative, Judicial, and Executive. Then, if Mr. Newhall was an officer of that government, he was either a legislative, executive, or judicial officer.

As no one will claim that he was a legislative officer, we may place that department out of view; and then, if he was an officer at all, his office was either executive or judicial.

If the acts of the commissioners in this case were *ministerial*, and *not judicial*, then it will follow that the Acts of Feb. 12th, 1793, and of Sept. 18th, 1850, are both unconstitutional and void; because under the Act of 1793 (3rd sec.) (Dunlop's Laws U. S., p. 120, 121,) the fugitive from labor is to be taken before any *judge* of the Circuit or District Court of the United States, residing or being within the state, or before any *magistrate* of a county, city, or town-corporate," &c. And by sec. 1 of the Act of 1850, (Dunlop's Laws U. S., p 1252,) it is provided, "that the persons who have been, or may hereafter be appointed Commissioners, in virtue of any act of Congress, by the Circuit Court of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that *any justice of the peace or any magistrate* of any of the United States, may exercise," &c.

And sec. 4th of the same act provides, "that the Commissioners above named, shall have concurrent jurisdiction with the JUDGES of the Superior and District *Courts* of the United States. * * * * And the JUDGES of the Superior Courts of Territories. * * And shall grant certificates to such claimants upon satisfactory proof being made," &c.

The person arrested and claimed as a fugitive slave can be taken, by the provisions of these acts, for trial, only before the following officers:

1st. *Judges* of the Circuit and District Courts of the United States.

2nd. *Judges* of the Superior Courts of Territories.

3rd. *Justices of the peace* or *magistrates* of a county, city, or town corporate.

4th. *Commissioners* of the United States, appointed by the Circuit Courts — of the United States, and whose authority in these cases is made co-extensive with that of magistrates, &c.; and judges of the Circuit and District Courts of the United States, and judges of the Superior Court of any Territory.

But judges of the Circuit and District Courts of the United States, and of the Superior Courts of any territory of the United States, and justices of the peace, and magistrates of any county, city, or town corporate, are *judicial* officers.

And Congress has no power to impose *ministerial* duties upon *judicial* officers. (Haybburn's Case, 2 Dallas p. 409; Story on the Constitution, § 1777, and the authorities there cited.)

If, therefore, the duties of Commissioners in these cases are *ministerial* only—the same acts, in these cases, by judges of the Circuit and District Courts of the United States, and judges of the Superior Courts of Territories of the United States, are also *ministerial* only—and the acts of Congress, that attempt to impose these *ministerial* duties upon *judicial* officers are void.

By the words of the Act of 1850, the authority of Commissioners is co-extensive with that of magistrates, and of the class of judges above named, and no more. If the magistrates and judges have no authority in such cases, it follows that the Commissioners are also without authority.

Then it follows that the acts of 1793 and 1850, above mentioned, are void; because the only persons named in these acts to issue warrants, and hear this class of cases are *judicial* officers, and they cannot be charged with *ministerial* duties.

If the acts are *ministerial*, then they must be discharged by executive officers of the government. And no act has yet been passed which clothes any *executive* officer with the power to issue warrants, and hear and decide cases, under these Acts of Congress.

1st. *The duties of the Commissioners are* JUDICIAL.

The third clause of Section 2nd, Article 4th, of the Constitution of the United States is:

"No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Four conditions must exist, before the person who is claimed can be delivered up, under this clause of the Constitution:

1st. He must be held to service or labor.

2nd. He must owe such service or labor to the person who makes the claim.

3d. He must owe such service or labor in the state from which he escaped, according to the laws of such state.

4th. He must have escaped *from* one state *into* another.

Here, then, are three questions of fact, and one of law, to be decided—and all of them in favor of the claimant, before the person can be delivered up.

And, to decide these questions correctly, it may be necessary to determine whether, or not, if the person claimed ever was a slave, he may not have been emancipated, by some act of his

former master—as, by taking him into a free state; or by contract and accepting a sum of money for the manumission of the person claimed; or, by forfeiture of the claimant's right to hold the slave as such, by some act of the legislatnre of the state from which he fled—as for cruelty, or for treason of the claimant. So, too, the person may be the heir-at-law of the former holder, but the slave may be "*chattels personal*," in the hand of the executor, as in South Carolina,—or, the person may be claimed by the executor, and may by law have descended to his heir, as in Louisiana.

These, and very many other, questions of fact and of law may occur in such examinations.

And upon the question of law, "whether he owes such services or labor to the claimant *according to the laws* of the state *from which he fled*"—questions of grave importance, may be involved, as, under recent acts of Arkansas and other states, which reduce free men of color to slavery, if they come within their states, and remain there for certain short periods of time,—are such acts constitutional? Are they *laws*—whether expressly forbidden, or not, by the constitution of the state?

So, too, it may, and often does, become a serious question, in such cases, what effect has the bringing of the person, by the master, into a free state, and a subsequent return of the person into the state from which he was brought, upon the *status* of such person, when he is afterwards claimed as a slave? Does the principle, "once free, always free" control the *status?* If the person has been driven by the force of winds, and the currents of a river, against the will of the master, into a free state, is he free? as England claims, and has steadfastly held; or is he still a slave, as claimed by Arkansas, and other states?

All these, and many more such questions, both of fact and of law, may arise—and if they do, the Commissioner must decide them.

But, whatever may be the questions raised by the evidence—it must be decided that the person claimed:

1st. Is *held* to service or labor; that is, is a slave.

2nd. That he owes such service or labor, or in other words is a slave, ACCORDING TO THE LAWS OF THE STATE from which he is charged to have fled.

3rd. That he owes such service or labor to the same person who makes the claim.

4th. That he *escaped from* one state *into* the state in which he was captured and the trial had.

All these are *judicial* questions, and the decision of them. judicial acts.

2nd. Judges of the Circuit and District Courts of the United States, judges of the Superior Courts of the territories of the United States, justices of the peace, and magistrates of any county, city, or town corporate, are the officers appointed by these acts of Congress to issue the warrant, arrest, and hear and determine the questions of fact and of law, that may arise in examining the "claim"—and the Commissioners, by sec. 1 of the Act of 1850—as well as by the act of August, 23rd, 1842 (Dunlop's Laws of the United States—p. 1004—are "authorized to exercise the powers that any *justice of the peace* or other *magistrate* of any of the United States may exercise," and by the 4th sec. of the act of Sept. 18th, 1850, "they shall have *concurrent jurisdiction* with the judges of the Circuit and District Courts of the United States," &c.

JUDICIAL officers, and commissioners who by express enactment have concurrent jurisdiction with *judicial* officers, are the only persons selected by Congress to perform these acts,—and therefore Congress determined to confer upon them in these cases *judicial* powers.

Why did they by the acts of August 23rd, 1842, and of September 18th, 1850—first, in express terms, make the power of these Commissioners co-extensive with that of justices of the peace, and by the last named act, with that of the judges of the Circuit and District Courts of the United States, and of the judges of the Superior Courts of the Territories of the United States—unless it was for the sole purpose of conferring upon these Commissioners JUDICIAL power. Such Commissioners, by the act of Feb. 20th, 1812 (Dunlop's Laws of the United States, page 461, sec. 1 and 3,) "had power to take acknowledgments of bail and affidavits in civil cases, and to take depositions in *perpetuam rei memoriam*;" that is, they were public notaries. Why enlarge their powers, except to confer *judicial* power upon them?

3d. And by the plain terms of the Acts of 1793, the duties to be discharged by the Judges of the Circuit and District Courts of the United States, Justices of the Peace, and Magistrates, are *judicial* duties.

Thus Section 3d, of the Act of 1793, [Dunlop's Laws of the United States, pages 120, 121,] provides that "*upon proof to the satisfaction of such Judge or Magistrate* * * he shall give a certificate thereof to said claimant.

And by the 1st Section of the Act of August 23d, 1842, (Dunlop's Laws of the United States, 1004,) the Commissioners shall, and may, "exercise all the powers that any Justice of the Peace may exercise, in respect to offenders, for any crime against the United States, by *arresting*, *imprisoning*, and *bailing* the same, &c."

By Sec. 2. "That in all *hearings* before any Justice or Judge of the United States, or any Commissioner appointed as aforesaid."

A "*hearing*" before a Judge under this section is a judicial act, and, therefore, the same "*hearing*" before a Commissioner is also a judicial act"

The 4th Section of the Act of 1850, (Dunlop's Laws of the United States, p. 12, 52,] * * * "The Commissioners shall grant certificates to such claimants, *upon satisfactory proof being made*, &c."

And in Section 6th of the Act of 1850, "The person arrested is to be taken forthwith before such Court, Judge, or Commissioner, whose duty it shall be "to *hear* and *determine* the case of such claimant in a summary manner, and upon *satisfactory proof* being made," * * that the person so arrested does, in fact, owe service or labor to the person or persons claimant, him or her, * * * to make out and deliver to such claimant a certificate, * * and the certificates * * * shall be conclusive of the *right* of the person * * in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons, by any process issued by any Court, Judge, Magistrate, or other person whomsoever."

In the last sentence of Section 6, it is provided, "In no *trials* or *hearing*, under this Act, shall the testimony of such alleged fugitive be admitted as evidence.

"*Trials or hearings*," are certainly *judicial* and not *ministerial* acts.

Section 8th. "Or where such supposed fugitive may be discharged out of custody *for the want of sufficient proof*, as aforesaid." * * And in all cases where the proceedings are before a Commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, &c., or a fee of five dollars in cases '*where the proof shall not, in the opinion of such Commissioner*,' warrant such certificate and delivery."

In one respect the authority of the Commissioners under this Act of 1850, is more widely extended than is that of the Circuit or District Courts, for the authority of these courts is confined to the District; but by Section 5th of this Act, the warrants of these Commissioners "shall run and be executed by said officers, any where in the States within which they are issued."

Nor is the authority of the Commissioners, under the Act of September 18th, 1850, of a *mixed* character; that is, partly ministerial and partly judicial. *It is wholly judicial.* No where in the whole act is he required to do a single ministe-

rial act. He examines the affidavit, judges of its sufficiency, issues his warrant for arrest, swears the witnesses, hears and determines the case made before him, and grants, or refuses to grant, his certificates. He does the same acts, and no more, in such cases, that the Judges of the Circuit or District Courts of the United States would do if the case were before them, than Judge McLean did in Miller vs. McQuery, 5 McLean's Reports, page 469.

In *The United States* vs. *Lawrence*, (3 Dallas, page 42,) the Supreme Court decided that the issuing of a warrant is a *judicial* act, because the Judge decides upon the sufficiency of the affidavit before he does so. And in *Wise* vs. *Withers*, (3 Cranch 33,) the same court decided that a Justice of the Peace for the District of Columbia, is a *judicial* officer, because, although his acts are partly ministerial, they are also partly judicial in their character.

And in *Prigg* vs. *The Commonwealth of Pennsylvania*, (16 Peters, on page 616,) Judge Story, in delivering the opinion of the majority of the Court, says:—

"It is plain that where a claim is made by the owner out of possession of a slave, it must be made, if at all, against some other person, and inasmuch as the right is a right of property capable of being recognized and asserted before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties and *a case* arising under the Constitution of the United States, within the express delegation of *judicial* power given by that instrument."

In the case of *Miller* vs. *McQuerry*, (5 McLean's Reps., 469,) the plaintiff claimed McQuerry as his fugitive slave. Judge McLean tried the case, the witnesses were examined before him and counsel for the plaintiff and defendant heard, and Judge McLean decided that McQuerry owed service to Miller; that it was his slave; and ordered him into the custody of his master.

Now if *this* was a *judicial* act, if Judge McLean acted as a Judge in the case then, the very same act when it is done by a Commissioner is *judicial*.

If it was a *ministerial* act, then Judge McLean did what he had no power to do, because he could not lawfully discharge ministerial duties.

In the *American Insurance Company* vs. *Canter*, (1 Peters, page 536,) Chief Justice Marshall, delivering the opinion of the court, says:

"The Judges of the Superior Courts of Florida hold their offices for four years. *These courts then are not constitutional courts in which the judicial power conferred by the Constitution*

can be deposited. They are incapable of receiving it." * * * * * * * * * * * "The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but conferred by Congress in the execution of their general power which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State Government."

In the case of the Judges of the Territory of Florida, they were appointed by the President, by and with the advice and consent of the Senate; they received at stated times a compensation for their services, which could not be diminished during their continuance in office, but they did not hold their offices during good behavior, and were therefore incapable of receiving any portion of the judicial power of the United States.

And in the latest case in which this question has arisen, *Commonwealth of Ky.* vs. *Dennison, Governor, &c.*, decided at the December term, 1860, (24 Howard, 66, in pages 108, 109,) Chief Justice Taney, in delivering the opinion of the Court, says:

"And laws were passed authorizing State Courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, &c. * *

"And in these cases the co-operation of the States was a matter of *comity* which the general sovereignties extend to one another for their mutual benefit. It was not regarded by either party as an *obligation* imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard *it as a duty*, and leave it to the States to exercise it, or not, as may best comport with their own sense of justice, and their own interest and convenience."

(But if Congress cannot *give* jurisdiction in such cases, the judges or magistrates cannot *receive* such jurisdiction. In either case it is alike a violation of the Constitution of the United States and of the great duty of supporting that instrument. The only excuse that can be offered for the acts referred to, is that they were passed by mistake, and acted upon by mistake.)

The error, however, was soon discovered, and State Judges, faithful to the duty of supporting the Constitution of the United States, refused to act under certain acts of Congress which were intended to confer judicial power of the goveen-

ment of the United States upon them. Thus in *United States* vs. *Campbell*, (Tappan's Ohio Reps., 29,) on information filed by John C. Wright, collector of the revenue, against Campbell for selling distilled spirits without a license, in June, 1816, Judge Tappan decided, "The judicial power of the United States extends to the case before this Court, and that power is wholly vested in the United States Courts. * * * * * * * * * * * * * * * * There is no clause in the Constitution of the United States which authorizes Congress to give jurisdiction to State Courts, or to require the performance of judicial duties of them."

In *Jackson* vs. *Rose*, (2 Virginia Cases, 34,) which was an action of debt under the same act of Congress as in the case of *United States* vs. *Campbell*, the General Court of Virginia decided that the State courts have no right to exercise any part of the judicial power of the United States, and that the act of Congress that attempts to confer such power upon them was void.

"The Constitution" (said Judge White, on page 40, who delivered the opinion of the Court in that case) "does not provide that the State Judges shall hold their offices during good behavior."

And on page 49, "It is the unanimous opinion of this Court that to assume jusisdiction over this case would be to exercise a portion of the judicial power of the United States which by the Constitution is clearly and distinctly deposited in other hands, *and that by doing so we should prostrate that very instrument which we have taken a solemn oath to support.*"

In the *State of Maryland* vs. *Rutter*, Marshal of the Maryland District, (12 Niles Register, page 115,) on *habeas corpus* it appeared by the return that the petitioner, Joseph Almeida, was detained by the Marshal by virtue of a warrant issued by Thomas Griffith, a Justice of the Peace of Baltimore County, Maryland, in which it was stated that information upon oath had been given to the magistrate, that Almeida had been guilty of piracy in cruising and capturing the property of subjects of the King of Spain, under a commission from a Prince or State with whom the King of Spain was at war.

Judge Bland said, "As an arrest, or a commitment, for a trial presupposes an authority and jurisdiction, it will therefore be necessary, in the first place, to dispose of the question relative to jurisdiction, for if the judicial officers of the State cannot have any jurisdiction whatever invested in them by Congress, in any criminal case, it is evidently useless to inquire whether there be such proof of criminality for which the accused may or may not be committed for trial before the proper tribunal of the United States. * * * The great question

then is, *can Congress constitutionally invest the judicial officers of the state, with any portion of the judicial power of the United States in any criminal case whatever?*"

After an elaborate and able argument he says:—

"I feel perfectly satisfied that Congress can have no constitutional right to confer any portion of the judicial power of the United States upon any State officers whatever, in the manner that has been attempted by the Act of Congress, 24th of September, 1789, Section 33, and which has been assumed and acted under by Thomas Griffeth, a Justice of the Peace of this State, in the case now before us. * * And, by order of the Court, the prisoner, Almeida, was discharged. On page 231 of the same volume, is the opinion of Judge Hanson in the same case which he concludes by saying, "I am of opinion, therefore, * * that State authorities cannot act in any stage of prosecution for offenses against the laws of Congress."

See, also, *The Commonwealth vs. Feely*, 1 Virginia Cases, 321;

Martins Lessee vs. Hunter, 1 Wheat. Reps., 304.
United States vs. Lathrop, 17 John. Reps, 4.
Ely vs. Peck, 7 Conn. Reps. 239.
Davidson vs. Champlin, Ibid, 244.
Haney vs. Sharp, 1 Dana's (Ky.,) Reps. 442.
3 Story's Comm. on the Consti., 114, 115–386.
Seargent's Const. Law, 386–398.
Rawle on the Constitution, p. 200.
1 Kent's Com. pages 403, 404.

And in *Prigg vs. The Commonwealth of Pennsylvania*, 16 Peters, the Supreme Court having been pressed by the arguments of counsel, that the act of 1793, so far as it attempted to confer jurisdiction upon *state* officers, was unconstitutional, and void,—said, (per Judge Story, on page 622 of that case.)

"As to the authority conferred upon state magistrates, while a difference of opinion has existed and may exist still on the point, in different states, whether *state* magistrates are *bound* to act under it; none is entertained by this court, that state magistrates may, *if they choose*, exercise that authority, unless prohibited by state legislation."

And Chief Justice Taney, in his opinion (p. 630) in that case, says:

"The state officers mentioned in the law, are *not bound* to execute the duties imposed on them by Congress unless they *choose to do so*, or are *required* to do so, by *a law of the state;* and the state legislature has the power, if it thinks proper, to prohibit them."

In the *Commonwealth of Kentucky vs. Dennison, Governor*, &c., 24 Howard Reps., on pages 107–108, Chief Justice Taney delivering the opinion of the Court, says:

"And we think it clear that the Federal Government under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for, if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state; and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state." And on page 109, he says, "and in these cases, the co-operation of the state was a matter of *comity*. * * The acts of Congress conferring jurisdiction, merely gave the power to the state tribunals, but do not *purport* to regard it as a *duty*, and leave it to the states to exercise it, or not, as might best comport with their own sense of justice, and their own interest and convenience."

But if the act in question was *law;*—a law of the United States; state legislation could not prohibit it. If it was *law;* it was not at all dependent for its acceptance, as law, upon the *choice* of the persons to whom it was intended to apply. This, then, is but another form of stating that the act, so far as it attempted to confer jurisdiction upon state officers, was null.

The Acts of Congress in question, do not, in terms, address themselves to the "*comity*" of the states or of the state officers. For example, the 33rd Sec. of the Act of Sept. 24th, 1789, (Dunlop's Laws of the United States, pages 70–76.) provides,

"That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of the United States, where he may be found, agreeably to the usual mode of process, against offenders in such states, at the expense of the United States, be convicted and imprisoned, or bailed, as the case may be, for trial before such Court of the United States, as by this act has cognizance of the offence." There is no more appeal here to the "*comity*" of the state officers, than there is to that of the Judge of the United States.

Nor is it for the reason that the officer "may be overloaded with duties which would fill up all his time, and disable him from performing his obligations to the state;" because, with nearly all the justices of the peace in the United States, they have, in fact, time enough to attend to all their duties under the laws of the state, and also to such casual business as, from time to time, as may be brought before them under the laws of the United States. But it is for the higher and nobler reason, that the Constitution of the United States has, in plain terms, (in the

language of Judge White, in *Jackson vs. Rose*, 2 Virginia Cases, 36–41,) "deposited the jurisdiction in other hands, and that by assuming jurisdiction over such cases, the state judges would *prostrate that very instrument which they have taken a solemn oath to support.*"

In *Prigg vs. Pennsylvania* Chief Justice Taney said:

"Now, in many of the states, there is but one district judge, and there are only nine states which have judges of the Supreme Court residing within them. The fugitive will frequently be found by his owner at a place very distant from the residence of either of these judges; and would certainly be removed beyond his reach before a warrant could be procured from a judge to arrest him, even if the Act of Congress authorized such a warrant."

In, perhaps, nine cases out of ten, if none but the Judges of the Circuit and District Courts of the United States could act upon the subject, the fugitive would make his escape even before a warrant could be issued for his arrest. The Circuit or District Judge might be a hundred miles from the place where the fugitive was found, and as there are but few such judges in the states, nearly all the fugitives would escape, before they could be arrested. The act of Congress, requiring *state* officers to issue warrants and make arrests in such cases was void. Some other persons must, therefore, be provided, and accordingly we find that, promptly, after the decision of *Prigg vs. Pennsylvania*, 16 Peters (at December Term, 1842,) Congress passed the act of August, 23rd, 1842, the commissioners "may exercise all the powers that any justice of the peace, or other magistrate of any of the United States, may now exercise in respect to offenders, for any crime or offence against the United States, by arresting, imprisoning, or bailing the same," &c.

And after waiting for nearly eight years, we find the act of Sept. 18th, 1850, the 3rd section of which provides:

"That the Circuit Courts of the United States, and the Superior Courts of each organized territory of the United States, *shall*, from time to time, *enlarge* the number of commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties enforced by this act."

Thus proving that the Congress of 1842, and that of 1850, concurred with the Supreme Court in the opinion that the Congress has no power, by the Constitution, to confer any judicial duty on a state officer.

In *Albeman vs. Booth*, 27th Howard, 506, in pages 525, 526, Chief Justice Taney, delivering the opinion of the Court, says:

"And as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings, nor the validity of its sentence could be called in question, in any other court, either of a state or the United States, by *habeas corpus*, or any other process."

"If there were any defect in the power of the Commissioner, or in the mode of proceedings, it was for the tribunals of the United States to revise and correct it, and not for a state court."

"But although we think it unnecessary to discuss these questions; yet, as they have been decided by the State Court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say, that, in the judgment of this court, the act of Congress commonly called the Fugitive Slave Law is, in all its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law."

You will observe that the court had already decided the case, before they expressed the opinion that the Fugitive Slave Law is, in all respects, constitutional, and that the commissioners had lawful authority to issue the warrant and commit the party. The opinion, then, is mere *obiter dictum* but still as it comes from the Supreme Court of the United States, it should be carefully examined.

The case was argued only by the Attorney General of the United States; no argument was made on behalf of defendent, Mr. Booth.

It is not easy to reconcile the opinion thus expressed by the Chief Justice, in this case, with the opinion of Judge Story, in *Prigg vs. Pennsylvania*, and of Chief Justice Taney in the same case; and in the recent case of *Commonwealth of Kentucky vs. Dennison, Governor*, of Ohio. In those cases all the Judges of the Supreme Court held, that Congress could not *require* state magistrates, or judges, to issue warrants, &c., under the act of 1793.

If they acted at all, they did so as a matter of comity, and not of official obligation.

But did that Court, by these broad expressions, intend to overrule, and have they overruled, the cases of *Hunter's Lessee vs. Martin*, and of the *American Insurance Company vs. Canter?* They are not mentioned in the whole case, either by the Attorney General or by the Court. They cannot be overruled—for the reason that they are plain and clear expositions of the Constitution of the United States. What court *can* overrule the doctrine that the President, by, and with the

consent and advice of the Senate, must appoint ALL the judicial officers of the United States? That before any one of them, can act after his appointment and confirmation, he must be commissioned by the President—must hold his office during good behavior; and be paid, at stated times, a salary which cannot be diminished during his continuance in office. Surely the Court did not intend to do any such thing—and yet, if this *obiter dictum* is *law*, they have overruled the Constitution under which they hold their offices.

It is not merely because a man is a state officer, that he cannot receive any part of the judicial power of the United States. The true reason is, that he is *not* an officer of the United States. No person can receive any office of the United States, whether it be legislative, judicial, or executive, except through the channel provided by the Constitution. "He that entereth not in by the door, but climbeth up some other way, the same is a thief and a robber."

Every argument that proves that a state magistrate cannot receive any part of the judicial power of the United States, applies with equal force to these commissioners.

If the commissioners lacked but *one* of the qualifications, required by the Constitution in all persons who receive and exercise judicial power of the United States, that would be sufficient, as in the case of The *American Insurance Company vs. Canter*, 1 Peters' 511-546; Story on the Constitution, § 1636.

The 4th sec. of the act of 1850 gives to these commissioners "concurrent jurisdiction with the Judges of the Circuit and District Courts of the United States, WITHIN THE SEVERAL STATES." And the warrant in this case was issued at Cincinnati, within the State of Ohio.

But, in this case, *all* the qualifications made imperative by the Constitution are wanting.

The question then, is,—are these Acts of Congress that confer judicial power on these Commissioners, in accordance with the Constitution of the United States?

By the 3rd clause of article second of the Constitution of the United States, he, (the President,) "shall take care that the laws be faithfully executed, *and shall commission all the officers of the United States.*

Article 3d, of the Constitution, provides:—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

In Article 2, Section 2, it is provided, "He" (the President) "shall have power, by and with the advice and consent of the Senate, to make treaties, * * and he shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * Judges of the Supreme Court and all other officers of the United States whose appointment are not herein otherwise provided for, and which shall be established by law. But Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments."

Here, then, we find,

1st. That the Commissioner does, in fact, exercise *judicial* power.

2d. They are not appointed by the President,

3d. Nor confirmed by the Senate.

4th. Nor do they hold their office during good behavior.

5th. They are *not* commissioned by the President of the United States.

These commissioners have *no commission, as such, from the President of the United States.* The enquiry, whether they are judicial or executive officers of the United States, would seem to be useless—*they are not officers at all.*

Under the acts of 1842 and 1850, they are appointed by the Circuit Courts of the United States—and in this case, it appears on the face of the indictment, that Edward R. Newhall, the commissioner, who issued the warrant, was appointed by the Circuit Court of the United States, for the Seventh Circuit, and Southern District of Ohio.

6th. These commissioners do not "receive, at stated times, a compensation for their services, which shall not be diminished during their continuance in office," according to article 3rd, section 1, of the Constitution; but, on the contrary thereof, under sec. 8th of an act of Sept. 18th, 1850, (Dunlop's Laws of the United States, page 1254.) "in all cases where the proceedings are before a commissioner,—he shall receive a fee of ten dollars, in full, for his services in each case, upon the delivery of the said certificate to the claimant, his agent or attorney; or, a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery."

7th. Nor is this compensation paid by the United States, as the Constitution manifestly intends the salaries of the judicial officers of that Government shall be paid; but sec. 8th of the act of 1850, provides that the compensation of the commissioner shall be paid "*by the claimant, his agent or attorney*"—so that the commissioner enters into the service of the

claimant, from the time he writes the affidavit upon which to issue the warrant, and continues in his service until the case is decided; and looks to him for his pay.

8th. Whether they are amenable for misconduct in office to the Circuit Court, or must be impeached, may be a question of grave interest. They have "*concurrent jurisdiction*" with the Circuit and District Courts in cases under the fugitive slave laws, and concurrent jurisdiction implies concurrent independence; and accountability to the same superior.

There is another and shorter argument by which the same conclusion can be reached.

It was the policy of those who framed the Constitution of the United States, and of the states when they adopted it, to make all the judicial officers of the United States as independent of popular opinion as they possibly could. They are appointed by the President, confirmed by the Senate, hold their office during good behavior, and receive for their services a compensation paid at stated times, which cannot be diminished during their continuance in office. See Story on the Const. sec. 1600; also Kent's Com. 239, 294; 1 Tucker's Blac. Appx. 354, 356 to 360.

In pursurance of this policy no power was conferred upon the House of Representatives to interfere with the appointment of the judges.

But if Congress can, by law, confer judicial power upon persons who are not appointed by the President, nor confirmed by the Senate; this policy is wholly defeated. The persons who exercise such power, by whatever name the office may be called, are in truth, and in fact—Judges.

Nor can Congress, by law, establish new courts and direct that the Judges shall be elected by the people. There is but one channel through which the judicial power of the United States can be conferred upon any man, and that is the course defined by the Constitution.

If an act of the General Assembly of Ohio should confer *judicial* power upon notaries-public, and should authorize them to issue warrants for the arrest of persons charged with offences, and to try their cases, and fine and imprison such persons as they should find guilty, would not the act be void because no person can hold a judicial office in Ohio, (except by temporary appointment) unless he is elected by the people?

By the Act of February 20, 1812, the Circuit Court was authorized to appoint commissioners to take bail and affidavits in civil causes, and to take depositions; that is, the commissioners were to exercise only the powers of public notaries.

And by the Act of August 23d, 1842, the commissioners * * * "may exercise all the powers that any justice of the peace or other magistrate of any of the United States, may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same.

And by the 4th section of the act of September 18, 1850, "the commissioners * * shall have concurrent jurisdiction with the Circuit and District Courts of the United States in their respective circuits and districts *within the several states*, and the Judges of the Superior Courts of the Territories, severally and collectively, in term time and in vacation, and shall grant certificates to such claimants upon satisfactory proof being made, &c."

Now, if Congress can first extend the power of these Commissioners so as to give them the authority exercised by magistrates in certain cases; and then, secondly, enlarge it still more, so as to make it commensurate, in certain cases, with that of the Circuit and District Courts of the United States, "*within the several states*," &c., then Congress may at discretion still further enlarge the judicial power of these commissioners, step by step, or at one bound, so as at last to make the judicial power of these commissioners *within the several states*, in all respects equal to that of the Circuit and District Courts of the United States, within their respective circuits and districts; and then we would have the Circuit and District Judges appointed by the President, confirmed by the Senate, commissioned by the President, holding their office during good behavior, and paid for their services, at stated times, a compensation which cannot be diminished during their continuance in office; and another set of officers of equal power, differing from the judges only in the style of the office; who hold no commission from the President; are not appointed by him, nor confirmed by the Senate, have not one even of the constitutional qualifications for the office; discharging the same judicial duties that the Circuit and District Judges discharge!

If Congress has any discretion upon the subject where is the limit to its discretion? what clause of the Constitution restrains it in any respect? None. Congress has just as much power to give these Commissioners jurisdiction in all ejectment causes that may be brought in the Circuit Courts as they have in all causes under the fugitive slave act.

And if so, then at the discretion of Congress, officers may be created who exercise as much judicial power as the Circuit and District Judges do in their circuits and districts *within the states*, without being appointed by the President, or having

any one of the qualifications to receive any portion of the judicial power of the United States which the Constitution prescribes. If Congress can do so in one class of cases they can in another and still another, at their discretion, which would be absurd, and therefore the acts of 1842 and 1850, so far as they attempt to confer *judicial* power upon commissioners, are not in accordance with the Constitution, and are null and void.

The warrant issued by the Commisssioner was null and void. It was as utterly worthless as would have been a warrant issued without pretence of lawful power, by a lunatic in an asylum for the insane. It was worse than such a warrant; it was a violation of the Constitution of the United States to issue it, to receive it, or to serve it. All concerned in the service of it would have been trespassers. But the warrant in this case commanded the officer to arrest Grandison Martin and bring him before Edward R. Newhall in Cincinnati, and the attempt was made to arrest Martin in the Northern District of Ohio, and take him to Cincinnati; a distance of not less than one hundred miles. This act, if done, would have been an offence against the laws of the state; an assault and battery, and false imprisonment; a clear violation of the Constitution of the United States; and President Gordon prevented the men who held this worthless paper from committing these offences. Those officers were endeavoring to violate (let us hope from mere ignorance) the Constitution of the United States; President Gordon supported that Constitution, which is the supreme (earthly) law of the land, and for this; for maintianing, supporting, and defending the Constitution of the United States, he is in jail, herded with felons, and may be ruined; by the fine and costs which he has been ordered to pay.

At a time when the Constitution was trampled upon by thousands and tens of thousands of people; some by open warfare, and others, less honorable and far more dangerous, by professing to support it while they were doing all that they could to secretly subvert it, this man was faithful; and behold the result,—in prison! ruin!

Where it appears upon the face of the record that the Court has no jurisdiction over the subject matter or over the person, the judgment is void.

See *Bloom* vs. *Burdick*, 1 Hill's (N. Y.) Rep., 130.

In the matter of Underwood, 3 Cowen, 59.

Hall vs. *Williams*, 6 Pickering's (Mass.) Rep., 232; Story on Conflict of Laws, sec. 586.

Borden vs. *Fitch*, 15 John.'s Rep., 124.

Moore vs. *Starks*, 1 Ohio State Rep., 369.

Barger's Lessee vs. *Jackson*, 9 Ohio Rep., 164.
Hickey's Lessee vs. *Stewart*, *et. al.*, 3 Howard, 762.
Webster vs. *Reid*, 11 Howard, 437.

In this case, the record shows that George Gordon was indicted for resisting process issued by Edward C. Newhall, a Commissioner, &c., appointed by the Circuit Court of the United States. But the Commissioner had no power whatevr to issue any such warrant; it was null.

Unless the petitioner shall be pardoned he will have to pay the fine and costs. Even if he could be discharged by *habeas corpus*, the case of Mr. Booth is in point, to show that he is liable to be arrested again and again, as often as the courts of the state may discharge him; and the court of the United States, to which appeal might be made, is the same that has already passed upon his case. It is therefore the duty of the President to pardon the petitioner; that is to remove the illegal and unjust hand that now oppresses and detains him in jail, instead of succoring and sustaining him, as it should do.

SECOND.

So much for the authority of the person who issued the warrant. The warrant is null, because the commissioner had no power to issue it, and was not a judicial officer of the Government of the United States.

But if that warrant had been issued by a Judge of the Circuit or District Courts of the United States, it would have been void, because no crime, or offence, or other matter is stated in it by reason of which any officer of the United States has any authority to issue any such warrant. The charge is that *Grandison Martin* owed service or labor in the State of Kentucky, under the laws of said state, to *Isaac Pollock*, and that he escaped from the State of Kentucky, to the State of Ohio.

The question presented, and decided, in *Prigg vs. Pennsylvania*, 16 Peters, 539, and in *Ex parte Langston and Bushnell*, 9 Ohio State Reports, page 77, and in *Wright vs. Deacon*, 5 Serg. and Rawle, 64, *Com. vs. Griffith*, 2 Pick 11. (*Sims'* Case, 7 Cush. 294. *Kauffman vs. Oliver*, 10 Barr, 517. *Jones vs. Vanzandt*, 5 How. 229, and other cases on the same point, was: Has Congress the power to pass laws for the reclamation of fugitives from slavery? or, does that power rest only with the states?

These cases decide that the power to pass such laws is in Congress.

Let it be granted (for the sake of this argument) that the power is in Congress.

It is only from this stand-point, that it is now proposed to argue the question which I now submit.

The words of the 3rd clause of sec. 2nd, article 4th of the Constitution are:

"No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor *may be due.*"

The claimant must prove his claim.

He is the plaintiff in the action. (See *Miller vs. McQuerry.* 5, McLean's Reports, page 469,) *Prigg vs. Pennsylvania*, 16 Peter's 616. The burden of proof rests upon him. He must prove, 1st, that the person claimed is a slave; 2nd, that he (the plaintiff) is the person to whom his services, or labor, is due; 3rd, that he owes such service or labor, under the laws of the State from which he escaped; and, 4th, that he escaped *from* one state *into* another state or territory, of the United States.

A careful discrimination should be made between cases under this act, for the reclamation of fugitive slaves, and those cases in the State Courts, where a person held as a slave, sues for his freedom. In such cases, the burden of proof is upon the plaintiff, as he holds the affirmative of the issue. (See *Hudgins* vs. *Wright*, 1 Munf. 136–138; *May* vs. *Morris*, 7 Louisiana, 134, Cobb's Law of Slavery, § 287.) He claims that he is free, and must prove his claim.

In the free states, all persons are presumed to be free. In the slave states, all persons are presumed to be free, except blacks and mulatoes.

But the *status* of the person, by the state laws, or state regulations, is wholly immaterial in this inquiry. What is the *status*, by the Constitution of the United States, and the laws thereof, made pursuant to that Constitution, is the only question here. You have no more right to assume that a person is a slave, than you have to assume that he is guilty of a crime; and to arrest him in either case without warrant, supported by oath or affirmation. "The right of the people," means ALL of the people. It follows that the person claimed is, *prima facie*, a free man. And as the person may be black, he is, *prima facie*, under this clause of the Constitution, and under these acts, a freeman—even in those states where by the *state* laws, his color is *prima facie* evidence, that he is a slave. Wherever and whenever a man is arrested, and brought

before a judge or commissioner, under the claim that he is a fugitive slave, he is a FREEMAN until it is *proved* that he is a slave.

Thus, in replevin, at common law, or *de homine replegiando*, the defendant may deny, by his plea of *non cepit*, "and his denial is as good as the *surmise* of the writ, and rather better; because, the proof is incumbent upon the plaintiff." *Moore* vs. *Watts*, 1 *Lord Raymoad*, 613; S. C., 12 Mod. 423; Salkeld, 581; pleadings in the case, in Lill Entr. 293.

The whole object of the affidavit upon which warrant issues in these cases is, to procure the arrest of the alleged fugitive. It has never been held to be evidence against him on the hearing. It is no more evidence of the charge, than an affidavit, on which a warrant issues, and under which an arrest is made on charge of crime; is evidence before the jury, of the crime charged.

There is no intermediate condition between freedom and slavery.

"Our law," says Goldthwaite, Judge, in *Abercrombie's Executors* vs. *Abercrombie's Heirs*, 26 Alabama Reports, (N. S.) 494, "recognizes no other status, than that of absolute freedom, or absolute slavery."

In *Oatfield vs. Waring*, 14 Johnson's Reports, 188, Judge Spencer, in delivering the opinion of the Court, says:

"No person can be partly a slave and partly free; or a slave for one-third of the time, and free for two-thirds; he must be one or the other entirely."

In *Wynn* vs. *Carrell et al.*, 2 Grattan's (Va.) Reports, 227, the Court, per Allen, J., decided, that there is no intermediate condition, between free persons of color and slaves; such intermediate condition is unknown to the laws, and contrary to their policy.

And in *Henry* vs. *Nunn's Heirs*, 11 Ben Monroe's (Ky.) Reports, 239, Judge Simpson, who delivered the opinion of the Court, decided that there is no such intermediate condition. It is "unknown to the law. They are slaves, or they are absolutely free."

It follows then,

1st. The person, then, who is claimed as a fugitive slave, must be held to be a freeman, to all intents, and for all purposes; until, by due process of law, he shall have been proved to be a slave.

Then, so much of the 3rd section of the act of 1793, as authorizes the claimant, in such cases, "*to seize and arrest*" such fugitive from labor (without warrant) is void. And so much of the 6th section of the act of 1850, as empowers the claimant, "by seizing or arresting such fugitive, when it can

be done without process," &c., is also void. Because the 4th amendment to the Constitution, provides "The right of the people to be secure in their PERSONS, houses, papers, and effects; against unreasonable searches; and seizures SHALL not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the *person* or things to be seized."

And it *is* "unreasonable" to seize a *freeman*, without warrant supported by oath or affirmation, and issued upon probable cause.

Then it also follows, that the decision in *Prigg* vs. *Pennsylvania*, 16 Peters', so far as it declared the act of the legislature of Pennsylvania void, and contrary to the Constitution of the United States, is erroneous. No one even disputed or denied but that the legislature of that state, (and of all other states,) has the right, by law, to protect all *free persons*, within their state, from unreasonable searches and seizures.

The question in such cases, then, is, not how a *slave* may be proven to be the property of the person who claims him; but how a *freeman* shall be deprived of the liberty to which, *prima facie*, he is entitled.

2nd. The same conclusion may be reached by another process of reasoning.

All persons within the limits of a state are entitled to the protection of its laws, as they are amenable to the state for any crimes they may commit, while they are within it.

But by the 2nd and 3rd clauses of section 2, article 4th of the Constitution, two classes of persons may be withdrawn (under certain conditions) from such State protection.

1st. Persons who have committed treason, felony, or other crime, in one state, and who have fled into another state.

2nd. Persons who owe service or labor in one state under the laws thereof, and have escaped into another state.

The very fact that these clauses are made part of the Constitution, is a distinct recognition by the Constitution itself, that, but for their existence, the classes of persons to which they apply could not be removed from the state into which they have fled or escaped.

The authority of the state remains over them, subject only to the exceptions stated in the Constitution.

A man may have committed a crime in one state, and fled into another state, but still if he came into the state with the intention to reside in it he becomes a citizen of that state (if he has the other qualifications for citizenship) the moment he enters it. Thus, in Lieber's Encyc. Amer., vol. 4, p. 617.

(Appendix) referred to by Story in sec. 46, of Conflict of Laws, it is stated:

"Every person of full age, having a right to change his domicil, it follows that if he removes to another place with the intention to remain, (*animo manendi*) the latter *instantaneously* becomes the place of his domicil. It is of no consequence in such a case how short his residence may have been, for it is the fact, coupled with the intent, that settles his domicil."

See also Story's Conflict of Laws, sec. 946.
Betty vs. *Horton*, 5 Leigh,s (Virg.) Reps., 515.
In the *Venus*, 8 Cranch, 253.
Cooper vs. *Galbreath*, 3 Wash. C. C. Reps., 546.
Walton vs. *Falmouth*, 3 Shepley's (Me.) Reps., 479.

One may be considered "as '*dwelling and having his home*' in a certain town, though he has no particular house there as his fixed place of abode." *Inhabitants of Parsonfield* vs. *Perkins*, 2 Greenleaf's (Maine) Reps., 411.

But if he has been *charged* with crime in the state from which he fled, his rights as a citizen of the state into which he has fled are so far restricted by the Constitution as that he may be demanded by the executive authority of the state from which he fled, and when he is so demanded he must be delivered up (but he can be delivered up, for one purpose only,) "to be removed to the state having jurisdiction of the crime;" for the only purpose of trial for such crime.

If he is tried and acquitted he can return to the state into which he fled, and his rights of citizenship in such state are neither impaired nor abated by his temporary absence.

If he is tried and convicted, he may suffer the punishment for his offence and afterward return to the state to which he fled and the effect of his conviction upon his rights as a citizen is controlled only by the laws of such state.

But if he has committed crime and is not demanded by the executive authority of the state, he remains in the state as a citizen thereof, and notwithstanding his crime (his treason it may be) in another state, he has all the rights of a citizen of such state.

So, too, if he is charged with crime in one state, but the circumstances under which he left such state show that the term "*fled*" is inapplicable to him, he cannot be delivered up. (See opinion of Governor Fairfield, of Maine, 6 American Jurist, p. 226.) he remains as a citizen of the state into which he *removed* with his rights unimpaired.

The other class of cases is controlled by the same rules, subject to the exceptions provided by the Constitution.

The person may have owed service or labor in the state from which he escaped, and according to the laws of such state; he may have owed it for a term of years, or during the life of a third person; or for his own life; but that is not a matter with which the *state* has any thing to do; as soon as he enters the state, he is amenable to its laws, and entitled to its protection, and may, if he has the other qualifications, become a citizen the instant he enters the state.

If "the person to whom he owes such service or labor" forgives the debt, or forbears to claim his services or labor, his rights as a citizen or subject, are precisely the same as it no such claim had ever existed.

And of these rights he can be divested only under certain and well defined conditions: 1st. That he is held to service or labor in one state. 2d. Under the laws thereof. 3d. That he escape into another state. 4th. That the claim is made by the party to whom such service or labor may be due. When each of these conditions has been complied with he "shall be delivered up."

And even after the conditions in both the classes of cases, have been complied with; after the fugitive from justice shall have been delivered up; and the fugitive from slavery shall have been surrendered, still the state extends its jurisdiction over them, to protect them from injury. If the property of the fugitive from justice is wrongfully taken from him, he may sue in the courts of the state that surrendered him, and recover damages for the wrong. If he is beaten, if he is injured in his person, property, or reputation, the courts of that state are still open to him for redress of his wrongs.

See *Adams* vs. *Adams*, 13 Pick's, 386.

And so it is too, with the fugitive from slavery; if he be abused after he has been delivered up, he may have the offender punished for his wrong if it is an offence against the state. The law of the state protects them both so long as they are within its limits. In each case power is granted to certain persons *to take them out of the state* against their will, and to use so much force as may be necessary to do so. That is all.

In the case of a person charged with crime, he is a freemanarre sted under process from another state; as much a freeman as if he was arrested on the same charge under a process of the state into which he has escaped. In the case of him who is claimed as a fugitive slave, he is a freeman until the claim is established by j udgment of a court of competent jurisdiction.

There is a difference in the cases. The person who is *charged* with crime is to be delivered up; it is enough that he

is *charged* in due form of law and demanded by the executive authority of the state from which he fled. But in the case of a person claimed as a fugitive from service or labor, it must be proved that he is such before he can be delivered up. In the first case the person is surrendered expressly for subsequent trial for the offence with which he is charged. In the other case the delivering up is *absolute*, to the person to whom "such service or labor may *be due*." To the owner.

The acts of 1793 and 1850, both recognize the principle that the *claimant must prove his claim.*

Thus by section 3d of the Act of 1793 the claimant may sieze the alleged fugitive and take him before a judge or magistrate, and "*upon proof to the satisfaction*" of such judge or magistrate, &c., * * that the person so seized and arrested doth, under the laws of the state or territory from which he, or she, fled, owe service or labor to the person claiming him or her."

And by sec. 6th, of the Act of 1850, it is provided:

"That it shall be the duty of such judge, court, or commissioner to hear and determine the case of such claimant in a summary manner, and *upon satisfactory proof* being made, * * * * * * * * * * * that the person so arrested *does in fact owe service or labor* to the person or persons claiming him or her, &c."

And sec. 8 of that Act, provides, "That where such *supposed* fugitive may be discharged out of custody, *for the want of sufficient proof as aforesaid.*"

By sec. 4th, of the Act of 1850, provided: "And shall grant certificates to such claimants, *upon satisfactory proof being made.*"

This is valuable to the argument because it proves that those who passed the Acts above referred to, from 1793 to 1850, all concurred in the opinion that *the claimant must prove his claim;* that the burden of proof is upon him, or in other words, that the person claimed as a fugitive slave, is a freeman until the fact that he is a slave is established by the evidence and judgment against him.

The witnesses may know that the person is a slave, but that is not enough; the United States is called on to deliver him up, and the United States must be officially advised of that fact; just as when a man is upon trial for piracy, the witnesses may know that he is a pirate but as the United States must carry the judgment into execution the government must know that the man is guilty, as charged in the indictment. It can know that fact only by a regular verdict and judgement.

How must that fact be found? by what process of law is

that result to be attained? I answer in the words of the 5th amendment: "Nor shall *any person* be deprived of life, LIBERTY, or property, without due process of law."

And, therefore, it follows that the Acts of Feb. 12th 1793, and that of Sept. 18th, 1850, are unconstitutional and void, because under each of these acts the person is deprived of the "LIBERTY" to which, *prima facie*, he is entitled, by SUMMARY proceedings and not by due process of law.

These words were inserted in this amendment for the very purpose of cutting off and forever preventing *summary* proceedings against the life, liberty, or property of "*any* person."

They have no other meaning and were adopted to affect no other object. Congress has no more power to pass an Act by which a man's *liberty* may be taken from him by "a *summary* remedy," than it has to pass an act by which his property or his life may be taken from him by summary remedy. The only case in which it has power to pass laws for summary remedies are stated in this 5th amendment: 1. "Cases arising in the land or naval forces; 2, or in the militia when in actual service, in times of war or public danger."

The rule is, "Nor shall *any* person be deprived of life, liberty, or property, without due process of law."

There are but two exceptions to this rule, and the case of a person claimed as a fugitive from service or labor is not included in either of these. As this Constitution is "the supreme law of the land," and as all acts of Congress that are not made in pursuance thereof are null, it follows that the acts in question, if indeed, they provide no other than a summary remedy in such cases, are void, and no laws; no rules of conduct for the citizen, or of decision for the judge.

Do they, then, provide only such remedy? The question is of easy solution. The 6th Section of the Act of 1850, provides:—

"That it shall be the duty of such Court, Judge, or Commissioner to hear and determine the case of such claimant in a *summary* manner." And, although the 3rd Section of the Act of Feb. 12th, 1793, does not contain these words, yet it is manifest, from the Act itself and has never been doubted, that the remedy there given is a summary remedy and not by "due process of law."

See *Wright* vs. *Deacon*, 5 Sergeant and Rawle, 62, and 1 Kent's Com., 404, sec. 5; Story's Com. on Const., vol. 3, p. 677.

Neither of these acts give to the defendant, time to obtain witnesses; nor process to compel their attendance; nor the right to take depositions of absent witnesses; nor time to prepare for his defense; nor the right to have counsel; nor a trial

of disputed facts by jury; nor the right of appeal, or bringing a *certiorari*, or writ of error for error in the judgement of the court. While, on the part of the plaintiff, affidavits taken without notice, or a copy of a record, in a case to which he was not made a party, and made up in his absence, may be read in evidence against him. The Commissioner enters into the pay of the claimant from the time he issues the warrant, and receives twice as much for deciding in favor of claimant as he does if he decides against him.

The judgment of the court or commissioner in such cases is a *final* judgment.

This is evident from the Constitution itself.

Article 4th, section second: "A person *charged* in any state with treason, felony, or other crime, who shall flee from justice, and shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Here the person must be *charged* with treason, felony, or other crime, and must have fled from justice, and then on demand of the executive authority of the state, &c., he shall be delivered up, *to be* removed to the state having jurisdiction of the crime.

The state into which he has fled has no jurisdiction of the crime, and for that, and other reasons, he must be removed to the state that has jurisdiction of it.

He shall be delivered up "*to be*" (for the purpose of) being removed to the state having jurisdiction of the crime, that he may there be tried for the treason, felony, &c., with which he is charged.

The words are too plain for doubt. The party is *to be* delivered up for a trial in the state that has jurisdiction of the crime.

The delivering up is an *executive* act, and none but *executive* officers have any thing to do with it. (See *Commonwealth of Kentucky vs. Dennison, Governor*, above referred to.) The party is to be *arrested*, and taken to the place where the crime is charged to have been committed.

But, in the next clause, the phraseology is wholly different. There is no delivering up, there, for a subsequent trial. If it be doubtful whether the person owes service or labor to the claimant, he should not be delivered up at all; and cannot be in compliance with this clause of the Constitution.

No person *held* (not *claimed* to be held, but the *absolute* and *positive* word—"HELD,") to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service

or labor, but shall be delivered up, on claim of the party to whom such service or labor *may be due*."

The service or labor must *be due*—absolutely—and not contingently, wholly, and not in part—it must be due without doubt, to the person who makes the claim.

The words, "*delivered up*" are used in contradistinction to the words, "*discharged from such service or labor.*"

If he is "*discharged from such service or labor*," he is free; and if he is "*delivered up* on claim of the party to whom such service or labor *may be due;*" then the service or labor IS DUE to the person to whom he is so delivered up. And, if it be due by the judgment of the Court, then that claim to such service or labor has received the highest sanction that the wit of man can give it. What method could be devised; what process could be adopted, to make, and to acknowledge, that the service or labor IS DUE, more solemn than this is?

The contrast between these clauses is strong and well-marked. The person "*charged*" with treason, felony, or other crime, whether he is guilty or not guilty, must be delivered up.

But in the other case, the delivery can be made, only to the party to whom such service or labor "MAY BE DUE."

In the first case, the person "*charged*" with treason, &c., must be delivered up, for the porpose of being removed to the state having jurisdiction of the crime. But, in the other case, all these qualifying and restrictive words are omitted. The person claimed must be "delivered up" to the party to whom such service or labor may be due — not to remove him to the state from which he escaped,—not for subsequent trial of the claim—but as a *slave* to his *master* and *owner*,— who may sell him within an hour after he is delivered up—who may, and does, exercise over him all the power of a master over his slave;— to take him whither he pleases, to sell him to whom he pleases,—and at such price as it is his pleasure to ask,—or to retain him, and, if he pleases to do so, imprison him in close confinement for the remainder of his life.

These two clauses were drawn by the same person, at the same time, and the difference in language plainly shows a different intention as adapted to each class of cases.

In the case of the person charged with treason, felony, or other crime, as the offense is against *the state*, the demand must be made by the *state* acting through its executive power; and the faith of the state is pledged, by necessary implication, that when the person so demanded shall be delivered up, he shall be taken to the state from which he escaped, for the sole purpose of trial, for the crime charged against him.

But it is not so in the case of the person who is claimed as a fugitive from service or labor. The claim is made by a pri-

vate person,—the State in which such person resides, has nothing to do with making, or forbearing to make the claim, and may know nothing of it.

The person to whom such service or labor may be due, may be a man to whom the state in which he lives would not have entrusted any part of its power;—he may be a negro, or a white man;—he may be a citizen of the state, or a foreigner, who resides in it for business and temporary purposes only;—he may be the original holder of the claim, or trader, who has bought it on speculation,—after the escape of the fugitive;—he may be an honorable man, or a person who has just been released from the penitentiary, after a long and just imprisonment in it, for gross crime. It would be folly, in such cases, if the men who made the Constitution had trusted any thing to the implied faith of such person; and they have not done so.

Will any man impute to the framers of the Constitution, the intent to surrender one man, as *a slave*, into the absolute power of another man—as his master—where there could be a reasonable doubt whether the person so surrendered was a slave?

If, then, they did not intend to do so; they did not intend that any person should be delivered up as a slave—to the person who claimed him—but upon proof so clear, and full, and perfect, as to leave no doubt but that in truth and in fact; in law and in right; the person delivered up is the slave of the person to whom he is delivered.

But all this implies a *trial*—a fair, full, and impartial trial—of the claims of the respective litigants; so that when the decision is made, it shall be rightly made. And as there is no provision for any appeal or other process by which the matter can be tried again, the case must be still stronger; for if injustice is done at the first trial, it can never be repaired.

A jury may err in their judgment upon the facts submitted to them, and if so, a new trial can be granted; but no new trial can be had in any case decided against the alledged fugitive slave before a Commissioner. His fate is *sealed* for life.

If the Commissioner has jurisdiction his judgment is final and conclusive.

See *Armroyd* vs. *Williams*, *et. al.*, 2 Wash. C. C. R., 508.
Lessee of Rhoades vs. *Snyder*, *et. al.*, 4 Wash. C. C. R. 715.
Lessee of Wright vs. *Deklyne*, Peter's C. C. R. 199.

But Congress was not willing to leave this question to rest solely upon the rule of the common law, that a fact once tried and determined before a court having jurisdiction over the parties, and the subject matter, cannot be re-examined between the same parties and their privies, in any other tribunal; but

by the last clause of Sec. 6, of the Act of 1850, they provide, "that the certificate *shall* prevent all molestation, &c., by any process issued by any court, magistrate, or other person whomsoever."

Suppose the fugitive should sue in the state courts after his return—he must sue his master, or the heir or executor of his master,—and will not the judgment of a court of the United States bar the suit? For you will observe that the judgment of the commissioner, in these cases, is of as great dignity, and is as final and conclusive, upon the rights of the parties, as would be a judgment of the Circuit Court of the United States, between the same parties, respecting the same matter.

But suppose the party can bring a second suit, is that a reason for withholding from him his constitutional rights, in the first suit? In actions of ejectment to recover real estate, the real party may sue a second or a third time, but who ever thought that the fact that he can do so, is any reason for depriving him of his right of trial by due course of law on the first trial of his cause? In some states a case may be tried a second time on appeal, or the party may have a new trial, in some cases, as a matter of right upon claiming it; who ever claimed that the first trial might therefore be "summary," and not by due process of law?

In *Prigg* vs. *Pennsylvania*, 16 Peters, on pages 612, 613, Judge Story says:

"The slave is not to be discharged from service or labor in consequence of any state law or regulation; and certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates *pro tanto* a discharge of the slave therefrom. The question can never be how much the slave is discharged from; but whether he is discharged from any, by the natural and necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a private and absolute right."

Under an adjudication against a man, made by the Circuit or District Courts of the United States, or by a Commissioner, he may be taken from Massachusetts or Wisconsin, to Kentucky; may be taken in chains as a slave. The question is not how long he may be deprived of his liberty, under such an adjudication, but whether he can be deprived of it for an hour? Suppose he may sue in the state courts; in those courts he may be deprived of this rule of the Constitution of the United States. In Mississippi and in South Carolina the provision is,

no *freeman* shall be deprived of life, liberty or property, without due process of law.

In *Taylor* vs. *Porter*, 4 Hill (N. Y.) Reps., 140, on page 145, Bronson, Judge, says: "The words "*by the law of the land*," as there used do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

See, also, Kent's Com. 13, and note *b* to that page.
Kirkpatrick vs. *The State*. Meigs, 124, 126.
Wilkinson vs. *Leland*, 2 Peters, 658.
Hoke vs. *Henderson*, 4 Dev. 1.
Jones v. *Perry*, 10 Yerger, 59.
3 Story on the Const. U. S. § 661.
Varick vs. *Smith*, 5 Paige, p. 137.
Regents of the University of Maryland vs. *Williams*, 9 Gill and John, 365, 408.
Tucker's Blac. Com., Appx., 304, 305.
Parsons vs. *Bedford*, 3 Peters, 446, 449.

The law, to be according to the law of the land, must be a *general and public law*, equally binding upon every member of the community.

Sheppard vs. *Johnson*, 2 Humphrey's (Tenn.) Reps., 285, 298.
Marshall's Colonial History, chaps. 13 and 14.
Bissett's History of England, vol. 1, chap. 12.
Vanzant vs. *Waddel*, 2 Yerg., 260, 271.
Budd vs. *The State*, 3 Humph. 483, 490, 493.

In *Lee* vs. *Lee*, 8 Peters, 47;
Objection was made to the jurisdiction of the Supreme Court of the United States, under the Act of Congress of April 2, 1816, which declares "that no cause shall be removed from the Circuit Court for the District of Columbia, to the Supreme Court, by appeal or writ of error, unless the matter in dispute shall be of the value of one thousand dollars or upwards."

The Court said, "The matter in dispute in this case is the freedom of the petitioners. The judgment of the Court below is against their claims to freedom; the matter in dispute is, therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation. Had the judgement been in favor of the petitioner, and the writ of error brought by the party claiming to be the owner, the value of the slaves as property would have been the matter in dispute, and affidavits might be admitted to ascertain such value. But affidavits estimating the value of freedom are entirely inad-

missible, and we entertain no doubt of the jurisdiction of the Court."

On the part of the claimant, also, these acts are contrary to the Constitution, and void, because they do not give to him a right to try his claim by a jury. It may be readily granted that as yet no claimant has complained that his claim is tried by a commissioner and not by a court or jury, by due process of law. The reason that no such complaint has as yet been heard, may not commend these acts to the favorable consideration of fair and honest men.

But times change; the commissioners may, by some change of public opinion, change too, and be of all other men in the world the last, as they are now the first, that the claimants in such cases will choose to try their cases before; and when that time comes, those who now assert that these acts are constitutional will, probably, see their error and confess it.

The claimant has the right to a trial by jury, thus:—

In *Clark* vs. *Gautier*, 8 Florida Reps., p. 360, on page 363, Baltzell, C. J., (who delivered the opinion of the Court) says:

"The writ of *habeas corpus* has been allowed them, without dissent, so far as we can discover, not to try the right in case of real contest, but in cases of clear and unquestionable claim. It has been universally refused and deemed inadequate in cases where there has been such contest, and where the effect of a decision by the Court would be to deprive the party in possession asserting a claim, of the right of trial by jury. There has not been an adjudication by the courts of a Southern State cited to us, nor have we been able to find such, where, in a question of real contest, as to the right of freedom on the part of the person claimed as a slave, the remedy of *habeas corpus* has been considered the appropriate one to determine the question. At the North we well know that the right of a slave to a jury-trial has been earnestly insisted upon in all cases, even those presenting the clearest and most irrefragible evidence as to him. Here the effect of an allowance of the writ to the extent claimed, would be a denial by Southern laws and adjudication of Southern courts, to the white man, of the very privilege, claimed for the negro by Northern philanthropy."

And in the *State* vs. *H. B. Fraser, jailor, &c.*, Dudley's (Ga.) Reps., 42, the Court on pages 43, 44, say:

"The writ of *habeas corpus* is intended for the personal liberty of freemen and never was designed or used to try any right of *property*." * * *

"The guardian of Winney has other remedy. He may have his writ under the State, expressly designed to try the right of freedom, which gives ample relief. If the petitioner were

without remedy and could have no other protection against the hand of lawless violence, than this writ affords, the court would, without determining any right, make use of the power it possesses of protecting every individual in society, of whatever grade, to shield the petitioner until an adequate remedy could be provided."

* * On page 44 the Court says: "The right of trial by jury was also well understood and considered among the most invaluable rights secured by the *Magna Charta*."

* * On page 45 the Court says: "The Court will not trench upon the constitutional rights of another, to render men summarily what may be, and perhaps is, justice."

In *De Lacy* vs. *Antonine, et. al.*, 7 Leigh's (Va.) Reps., 438. on page 443, Tucker, (President of the Court of Appeals) delivering the opinion of the Court, says:

"In considering this case I conclude at once that under our law the *habeas corpus* is not the proper method of trying the right of freedom. The Act of 1795 has prescribed the remedy which the negro must pursue, &c."

"It is observable, however, that there is no provision in the Act which denies the *habeas corpus* to a *free* person illegally confined in custody, although he be a person of color; nor can I believe it ever was designed to exclude any freeman whatever from the benefit of this great and salutary writ. Where indeed upon the face of the petition it appears that the case presents a litigated question as to the right of a negro to his freedom, the writ should be refused as inappropriate to the case. When this does not appear by the petition, but comes out in the return and is sustained by the proofs, the party should be remanded or sent before a Justice of the Peace to make his complaint according to law." * *

* * "In such cases, therefore, the Court must exercise a sound discretion, discharging the party when there seems to be no real litigation, as to his right to freedom, and remitting him to his suit in *forma pauperis* where there is."

Though the *habeas corpus* is not the proper remedy where the *matter in question is the* right of freedom, yet where there is no contest about that right, but the litigation arises out of other matters it would be absurd to send the petitioner to sue in *forma pauperis*."

In *Thornton* vs. *De Moss*, 5 Smede's and Marshall's (Miss.) Reps. 609.

On page 618, Chief Justice Sharkey, who delivered the opinion of the Court, says: "In all civil proceedings, negroes are regarded by our law as property, and the owner or claim-

ant cannot be deprived of his right or claim, except by the verdict of a jury. The 48th section of the Act in relation to slaves, H. & H. Dig. 166, provides the mode by which any negro held or claimed as a slave, who claims to be free, shall establish his freedom, and it is the only remedy which he can pursue."

The question, under the Constitution of the United States, cannot be, how clear or how obscure the evidence of freedom may be, so as to give jurisdiction in one case and withhold it in another; whether the evidence is clear or not clear, a jury is the tribunal to which it must be addressed and which alone can weigh it. One question in such case is, "*liber vel non.*" The person arrested is either a freeman or a slave; *prima facie* he is free; that is a freeman, for all purposes until he is proved and decided to be a slave. And that question, by the decisions above referred to; and by *Magna Charta;* and by the 5th and 7th Amendments to the Constitution of the United States, can be tried and determined only by the verdict of a jury and in all other respects "*by due process of law.*"

In *Queen* vs. *Neale*, 3 Harr. and John, 58, the Court of Appeals of Maryland decided that,

"A negro petitioning for freedom is not competent to make an affidavit for a change of venue; his slavery or freedom being *sub judice.* Nor is he entitled to be heard in any manner as a freeman, until the fact that he is free is judicially determined."

See also, *Peter* vs. *Hargrave, et al.,* 5 Gratt (Va.) Rep., 14.

In Cobb's Law of Slavery, sec. 288, it is said: "Until the judgment affirms his right to freedom, he is a slave."

So too, in cases under the Acts of 1793 and 1850; until the judgment affirms his slavery, the party claimed is a *freeman*, and is therefore entitled to be tried as a freeman, by due process of law. Both rest upon the same principle, that the *burden of proof is upon the plaintiff.* When the slave sues for freedom, until he proves his allegation, he is held to be a slave; and where, under the 3rd clause of the 4th article, the claimant asserts that another person is his slave; he must prove his allegation; and the person claimed is *free*, until it is proved that he is a slave.

The Constitution of the United States does recognize a distinction between free persons and slaves; but it makes no distinction whatever, in any case between white persons and persons of color.

A white man, a citizen of the United States, may be claimed

as a fugitive slave; just as an innocent man may be indicted for piracy or murder; and the inquiry is, how is *such* a man to be tried when he is thus claimed? If "*by due process of law*," then the negro also must be tried by due process of law; because the Constitution of the United States makes no discrimination between white men and negroes in any case; still less as to the mode by which they must be tried for "life, liberty or property." The white man and the negro, when they are on trial before the courts of the United States, stand, as they do before the throne of God,—equals.

If it be said that these acts are intended to apply only to persons who in whole or in part are of the African race; then they are, for that reason, unconstitutional; because the Constitution does not warrant any such discrimination, (and the Acts of 1793 and 1850, in fact, do apply impartially to the white man and citizen, as well as to the black man) and if they do apply to the white man; the citizen; then such man may be deprived of his liberty for an hour, or a day, or a year, under these Acts, without trial by jury or other "*due process of law*."

No person, probably, will deny or doubt but that a trial or hearing of some sort must be had to determine the "claim" of the plaintiff. The Acts of 1793 and 1850 both provide for some kind of hearing or trial in such cases, and from 1793 to the present time, in all such cases, wherever the party has been taken before a magistrate, judge, or commissioner, a *trial* of some sort—a *hearing*—took place. Then the matter must be inquired into,—tried,—decided.

How?

"*By due process of law*," is the only answer the Constitution makes.

The true reading of the Constitution is this:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

(But) Amendment V. "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger. Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

It is a gross error to suppose that the 3rd clause of Article IV., is the whole Constitution of the United States. That clause provides that, *on claim*, &c., the fugitive slave shall be delivered up. Such claim is a controversy "between the parties, and a case arising under the Constitution of the United States," per Story, J., in *Prigg* vs. *Pennsylvania*, 16 Peters, 616.

But the 3rd clause of Article IV., does not state *how* the claim shall be made and tried. Amendment V. comes in, imposes certain negative provisions, one of which is, "*no person* * * shall be deprived of life, liberty, or property, without due process of law."

The words "NO PERSON," Sec. 3, Article IV., undoubtedly applies to fugitive slaves; and the same words "NO PERSON," in the 5th Amendment, comprehend them, as well as other persons.

The *context* of the 5th Amendment proves that the provisions and guarantees are intended to apply to, and embrace *all* persons, whether they be white or black, citizen or stranger, rich or poor, freemen or slaves. Thus, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." Certainly, no black man; no slave; no man of whatever condition in life, can be tried under the government of the United States, for piracy, (for instance) unless on presentment or indictment of a grand jury; nor can any such person, white or black, bond or free, "be twice put in jeopardy of life or limb for the same offence, or be compelled, in any criminal case, to be a witness against himself."

If "*any person*" may be deprived of "life, liberty, or property, without due process of law," then "*any person*" may be subject, for the same offence, to be twice put in jeopardy of life or limb; and "*any person*" may be compelled, in any criminal case, to be a witness "against himself," for it is all in one sentence of this amendment; and the phrase "*any person*," has exactly the same meaning and covers the same persons, in the seventh line of the sentence that it does in the fifth and sixth lines of the same sentence.

If this amendment was intended to apply only to "*free persons*," those who made the Constitution would have said so; as in the 3rd clause of Sec. 2, Article I.; which provides: "Representatives and direct taxes shall be apportioned among

the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of FREE persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of *all other persons*, i. e. slaves.

But further, this part of the 5th Amendment is but the re-enactment of the principal matter of *Magna Charta*, CAP. 29.

"*Nullus liber homo capiatur vel imprisonetur, aut disseisietur, de libero tenemento suo * * nisi, per legale judicium parium suorum, vel per legem terræ.*"

Magna Charta is restricted to "*liber homo.*" So too are the Constitutions of South Carolina and Mississippi, and perhaps other states. But not so the 5th Amendment of the Constitution; the word "FREE" was purposely and designedly omitted, as too restrictive.

Thus the state of New York, proposed as an amendment to the Constitution, that any *freeman* has a right to be secure from all unreasonable searches or seizures, &c. Vol. 1st, Elliott's Debates, (ed. of 1861) page 326.

And North Carolina proposed a number of amendments to the Constitution, the 9th of which was:

"That no FREEMAN, ought to be taken, imprisoned, or disseized of his freehold liberties, privileges, * * or exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the law of the land."

10th. That any *freeman* restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed. See Elliott's Debates, vol. 4, page 243.

But the Congress of March 20th, 1789, after reciting that the conventions of a number of the States proposed that certain declaratory and restrictive clauses should be added to the Constitution, proposed certain amendments to it; the 7th of which is now the 5th, amendment. Thus proving that it was the deliberate purpose of those who framed and adopted this amendment that the benefits should not be enjoyed only by free persons, but that they shall apply to *all*, no matter what may be their color or condition; to the man who is claimed as a slave, as well as to the white man, who may be under indictment for robbing the mail, or for piracy.

In slave States a slave cannot be twice tried for the same offence.

Exparte Jesse Brown, 2 Bailey 323.

Wheeler's Law of Slavery, page 222.

Cobb's Law of Slavery, § 311.

Neither the 3rd clause of Article 4th, of the Constitution, nor the Acts of 1793 or 1850, apply exclusively to persons of color. They have no such qualifying phrase; the language is general and embraces persons of any color; a white man; nay more, a citizen may be claimed as a slave, under these acts; and if he is claimed, the enquiry is, how is he to be tried for his freedom? by "due course of law," or by "summary remedy?"

No matter who the person is who is on trial for his "*liberty*," he must be tried by "due process of law," with the same absolute certainty that a person on trial for his "*life*" must be tried by "due process of law. The words are, "nor deprived of *life*, liberty, or property, without due process of law."

The government of the United States has no right, authority, or power to pass any law by which any man can be deprived of "life, liberty, or property without due process of law," except only in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

It never had such power or authority, and the Acts of 1798 and 1850, are therefore null and void; an usurpation of power by the government, which, not only has not been delegated to the United States, but has deliberately, clearly, and purposely been withheld from that government.

The words, "due course of law," had a settled and well defined meaning long before they were made part of the 5th Amendment; even before they were made part of *Magna Charta*. Thus, in 2 Inst., folio 50, Lord Coke in commenting on these words, "*nisi per legem terræ*," says: "Wherein it is to be observed that this chapter is but declaratory of the old law of England," and refers to cases that occurred in the time of Edward III.

The words are, "no person shall be deprived of life, liberty, or property, without due process of law." An act of Congress that would deprive a man of *part* of his property without due process of law, would be void. This amendment protects his life, his liberty, and his property, alike; the whole of each, including all its parts. No act of Congress can deprive a man of his liberty for an hour, or of a dollar's worth of his property, "without due process of law."

The right to liberty is a natural right, and it is guaranteed and confirmed by Amendment V, of the Constitution, and it may, in the language of Judge Story, (see p. 54, applied to this subject) fairly and reasonably be said that any Act of Con-

gress, or of any other department or office of the government of the United States which interrupts, limits, delays, or postpones any man's right, even for an hour, to his liberty; his right of locomotion; of going where it may be his duty, his interest, or his pleasure to go; without let or hindrance, from the government; does operate, *pro tanto*, a distruction of that right. The question cannot be, how much of his liberty he is deprived of; but whether he is deprived of any of it, without due process of law. "The question is not one of quantity or degree, but of withholding or controlling an absolute right."

The warrant, then, was null because it was issued under acts of Congress that are null; and the petitioner violated no law of the United States when he obstructed the service of this void writ.

THIRD.

In determining upon the validity of any act of Congress, we must look to the whole Constitution. If the act is in conflict with any part of the Constitution, it is void.

It would seem from the light we have now upon the subject, that when the third clause of Sec. 2, Article 4, was adopted, it could have been foreseen that there would be great difficulty in legislating upon the subject—lest in the attempt to carry into effect the purposes of that clause, other parts of the instrument should be violated. The whole Constitution is a Bill of Rights. It was ordained and established to secure the blessings of liberty; and the amendments are guarantees of almost every right that is valuable to men.

But in the midst of all these securities, for personal liberty, is the clause in question; placed there for the purpose of securing, not freedom; but slavery;—not the rights of man; but the power of his oppressor.

We have already shown that Magna Charta, the great bulwark of English and American freedom, has been stricken down by the acts of 1793 and 1850; that the American people, by these acts, have been deprived of its guarantees; and that if these acts are laws, then we have no GREAT CHARTER for our liberties.

I propose now to show that a still greater right has been destroyed by these enactments, and that if they are law, the right of RELIGIOUS LIBERTY—the dearest and highest right that man can enjoy;—the greatest blessing that ever human government can secure to the human race; is stricken down;—prostrate in dishonored dust;—a nullity.

The argument upon this topic needs not be long. No opposing decision stands in the way;—no reported case can be found upon the question;—no court has decided it.

All the parts of the Constitution that bear upon the question, should be taken into view, if possible at one time, so as to form one whole. The true reading of the Constitution is—

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up upon claim of the party to whom such service or labor may be due."

The Supreme Court in *Prigg* vs. *Pennsylvania*, (16 Peters,) decided that power is vested in the government of the United States to carry this provision into effect. By the last clause of Section Eighth, Article First, the Congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers, vested by this constitution in the government of the United States, or in any department, or officer thereof."

But in legislating upon this, as upon all other subjects that it may have power to legislate upon, (Article I. of Amendments to the Constitution,) it is provided that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances."

An act of Congress that should prohibit the people from READING the Bible, would unquestionably be *void*. Is not an act of Congress, that forbids them to OBEY it when they do read it, also void? It is not the profession of religion—but a word of wider grasp, and more extensive meaning—the "EXERCISE" of religion that is secured to us by this amendment. A man has the right guaranteed to him by this amendment, to be a Christian—to follow God and not Baal,—to follow Christ, and to obey all his commandments; and any act of Congress that interferes with his right to do so, in the least degree, is void; or this amendment is a nullity.

I start, then, with the proposition that every free person in the United States, has the right to read the Bible, with his own eyes; to understand it with his own understanding; and to obey every commandment in it. This right, like the right of self-defense, is not conferred by the constitution; it existed before the instrument was made, and will survive it, if ever the Constitution is changed or destroyed. It results from the nature of man, and his relations to his Creator. God commands him to do these things, and the command carries with it the right to do them. All that the first amendment to the Constitution does, is to recognize and guarantee the right.

The first amendment, provides that Congress shall not prohibit the "*free* exercise of *religion*."

What right does this guarantee?

The *free*—the *full*—the unrestricted exercise of the Christian religion can not be prohibited or interfered with by Congress. This AMENDMENT by its very name, was intended to repeal all things whatsoever that may be inconsistent with it, in the instrument which it amends. It was adopted two years after the Constitution, and being the later law, it repeals all preceding provisions there are inconsistent with it.

If both these rights can be exercised by the same person at the same time, there is no such inconsistency; but if they are inconsistent the one with the other, the right of liberty of conscience is the one which must be preserved, for that is given in the amendment; if no other reason could be given, this alone, would be sufficient. In the last message of President Pierce, he said (in substance) that it is the duty of all the people of the United States to obey the laws—referring probably to the law for the surrender of fugitive slaves. He is right; it *is* the duty of every man in the whole land, whether he be a citizen, or a stranger sojourning with us,—to obey all the *laws* of the land.

Then we are to obey the laws of 1793 and 1850; every man in the whole land is to obey not their letter only, but their spirit, and their true intent and meaning. To do everything, reasonably within his power, to carry them into full force and effect; and to abstain from doing any act, that may tend, even to defeat the purpose for which they were enacted. This is the duty of every citizen in relation to all the laws of the United States, and of the State of which he may be a citizen. These acts bind all; or none.

Let us look then at this law, and understand it as fully and clearly as we can—on what principle does it rest? what right does it recognize? what duties enjoin? what acts forbid?

The fugitive shall not be discharged by any law of the State into which he has fled, but shall be delivered up on claim of his owner or master. This then does recognize the rightfulness of the master's claim to the slave. It recognizes the rightfulness of any and every person who may sustain the relation of master, and claim the person as his slave; if he shall prove that his claim is according to law of the State from which the slave escaped.

Every master may claim every slave, who escapes from him, and therefore this clause of the constitution recognizes the rightfulness of the claim of every master to every slave. The whole system of slaveholding in the United States is thus sustained. Each slaveholder in the whole land may, as occasion requires it, appeal to this clause of the Constitution, and every man in the land is bound (if my construction shall not be correct) to aid, abet and assist in his claim.

The framers of the Constitution were practical men. They did not intend that the claim of the slaveholder should depend on his humanity to his slave. The language of the clause plainly excludes it. The claimant must prove the four conditions required of him by that clause, and when he shall have done so, the words are imperative; the person "SHALL be delivered up." No inquiry can be made into the character of the claimant, or the purpose for which he pursues his claim. It might defeat in many instances the claim itself. They intended that each and every slaveholder, just as his character was at the date of the Constitution; and each and every slaveholder who has lived in the United States from that time to the present; and who will live in them, from the present time till the whole system shall be abolished, shall have the benefit of this clause of the Constitution. It applies to the system as it then was; as it actually has been ever since; and as it ever will be. It applies to and protects the men who buy slaves, and take them in coffles from Virginia to New Orleans; to the man who pursues his own child that he may sell her for money; to the man who pursues a family that he may sell them each from the other by auction; to the man who pursues his slave for vengeance, that he may burn him with green faggots at the stake; to the man who does worse than that, who pursues him that he may put him to labor under the lash, in the cotton fields, until inch by inch his life by slow torture, is destroyed.

And it enjoins upon all the people of the United States the duty of aiding in their capture; wholly irrespective of the character of the master, or the purposes to which he means to apply his power over his slaves.

All must aid him, or this clause of the Constitution is not obligatory as a rule of conduct upon them.

And it forbids in its letter and spirit all acts that hinder the master from recapturing the fugitive slave.

To give provisions to an enemy in time of war is treason as well as to furnish him with gunpowder or fire arms, and for the same reason; food and clothing are as necessary as gunpowder to the soldier; without food his arms would be useless.

So too it is a violation of the letter and spirit, of the true intent and meaning of this clause of the constitution, to give food, or clothing, or shelter, or aid, or comfort, of any kind to a fugitive slave. If all would unite in witholding these supplies, he would be compelled to return to his master; and the fact of his return would deter others from running away. Such conduct does not it would seem, come within the letter of the penal parts of these Statutes, but it does come clearly and fully within its spirit and its meaning. It may not be punishable, but still it is a violation of the law; of its purpose and in-

tent. The law was intended to forbid all persons from giving aid to the fugitive—and to give him food only increases his strength to fly.

Then all persons are to join hand in hand when a fugitive slave comes into a free State, and retake him for his master, and are carefully to abstain from any and every act, or word or deed that may enable that slave to evade the pursuit of his master. All persons are bound so to conduct themselves as that the fugitive slave may be recaptured. That is, all persons are bound to recognize the rightfulness of the claim of every master to each and every escaping slave.

Let us now then look to the first amendment, and see what rights are guaranteed there? Every man in the United States is guaranteed the free exercise of his religion.

Every man then has the right, freely to exercise the Christian religion; and if this clause of the Constitution and the acts of Congress impair that right, this clause is repealed by the amendment, and these acts are void; for Congress can make no law impairing the free exercise of religion. Whether the act impairs such free exercise directly or *indirectly*; whether it has such effect from design, or from its unexpected application; the result is the same; the act is prohibited, and the law is *void*.

The Christian religion obliges all men to love God supremely, and to love our neighbor as ourselves; to do to others as we would they would do to us; to keep a conscience void of offence toward God and toward men; to relieve the oppressed; plead for the fatherless; help the stranger, and the poor and the needy.

Are these rights compatible with the duties enjoined, and acts forbidden by the third clause of the fourth article of the Constitution. If you can reconcile them, do so; but if they do conflict the one with the other, then the rendition clause must give way to, and is repealed by, the first amendment. Under that amendment the petitioner had the right to see in the person of Grandison Martin, a man and brother, in danger of being robbed and wronged of his dearest rights, and it was his duty to aid him if he could—and to the full extent of his power.

Christ enjoins as one of his laws; a law which this guarantee in the Constitution enables all men to obey; that what we do to one of his disciples is done to *Him*. They stand as his representatives on earth. If we enslave them, or aid others to enslave them, we aid others to enslave *Him*.

Whatsoever ye have done to the least, ye have done to me.

Here then are comprised in our Constitution two opposing principles. In the rendition clause the rightfulness of the whole system of slavery as it actually *is*; has been; and wil be; and of the American slave trade, is fully recognized and

sustained; under the other any man may, if he chooses, be a Christian—and all laws that impair his right to the free exercise of his religion are *void*.

By the one system it is our duty to treat the fugitive as a *slave*. By the other, as a man. The one requires us to aid his oppressor; the other gives us the right to rebuke and resist him. The one requires us to replace the chains that in his flight he may have cast off. The other to break every yoke and let the oppressed go free. The one requires us to aid the slaveholder in robbing his victim—the other to have no fellowship with his works of darkness.

An act of Congress that should require all men in the United States either to believe in the doctrine of transubstantiation, or to act as if they believed it, would be so openly and palpably void, as contrary to this amendment, that probably no man, for a moment, would sustain it. And is not an act of Congress that requires the whole people of the United States, either to believe that man may have property in man, or to act as if they believed it, void, for the same reason? Where is the difference in principle between the two cases? If there is none, these acts that compel the people of the United States to recognize "that wild and guilty phantasy," and to act as if that guilty phantasy is a truth, are void.

An act of Congress that should compel the people of the United States to recognize idolatry as their religion, and to act accordingly, would be void. Are not those acts, for the same reason, void, which "compel the people of the United States to act as if they believed that man can have property in man? There is no difference in principle. The only difference is, that idolatry has been conquered and a better and truer religion has supplanted it so fully that all men now condemn it—but slaveholding is now in the United States as powerful as idolatry was in the Roman Empire in the first century of the Christian Era; and that sin of the United States has depraved the hearts, and blinded the minds of the people and judges. The same men who now support slavery, if they had lived in the first century, would have been idolators. The same arguments that are now urged against liberty, were then urged against Christianity. If it was a *sin* then to throw a grain of incense on the Idol's Altar, for refusing to do which, Christians were burnt alive;—it is a sin now to throw a grain of incense on the altar of slavery—and the laws that *attempt to compel* the people to do so, are void—or this amendment is a nullity.

Our constitution comes in by this amendment and makes the law itself void, and so relieves him who otherwise would suffer. The world has gained all that it was worth having,

by this exercise of conscience against law; of religious liberty, in spite of legal enactment. Those who made this constitution, knew this; were grateful for it, and provided against the recurrence of the atrocities with which sin, in its hatred of religion, has filled the world.

If it be said, this is exalting the conscience of the man above the law, and making each man's conscience the standard of his conduct, I answer, it is; each man must, for himself, decide what he will do, or omit to do; it is part of his moral nature.

But the objection proves too much. In all ages of the world men have violated laws, formally enacted; being impelled to do so by their own private conscience. Daniel did so, when he prayed to God; the Hebrew children, when they refused to worship the Golden Image; the Apostles, when they preached the resurrection from the dead; the martyrs all did so; and this clause of the Constitution was made to provide for this very thing.

If it be said that other cases may arise and make this amendment one that shall cause great trouble; when they do arise, those who are charged with the administration of justice will know better than we do, how to dispose of them. This case comes clearly within the provisions of this amendment—and if the relief sought for be denied, the amendment is nullified—the guarantee of religious liberty useless. It is but folly to deny one man his right, for fear that if it be granted, another man will set up a *fictitious claim.*

We are bound to secure to the slave-holder his *rights.* Yes, certainly to him, as freely as to all other men—but that very obligation forbids us to aid him in his *wrongs;*—to sustain wrong, is to overthrow right. Each wrong, that we aid him to commit, weakens both his respect and ours, for all right.

Nor do we injure the slaveholder by withholding from him the aid he asks, to recapture his fleeing slave. It is the aid he solicits that is the real wrong to him. It ruins the best part of his nature; his moral being; his manhood; his soul.

If it be said, that those who framed the Constitution did not expect the application of this amendment to slave-holding; I answer, they laid down the principle without restriction, and intended it to be applied, in good faith, to all cases that might arise. They knew that Christianity, in its very nature, is aggressive; then she never can halt, for a moment, in her onward march; then her mission is to rid the world of all sin; and to overturn and overturn everything that exalts itself against God and his law.

They knew, too, that slavery is wrong, and freedom right:

that all men are by nature free and equal. It is not a change of principle, but only a change of circumstances which produces this result,—a law that would compel a man to aid another in keeping a grog-shop, would violate this guarantee. But the temperance cause was further from the minds of those who framed this amendment than the anti-slavery cause.

If Magna Charta had contained such a guarantee as that in this part of the first amendment, no doubt but when the Reformation came, its application to protect Protestantism would have been unlooked-for; but such an application would have but preserved the principle.

Law and tyranny are as different as light and darkness. Law has its province in the preservation of men's rights; tyranny destroys them. If slaveholding is not tyranny—what does the word mean? Where has the crime been committed? And as it is tyranny, then each slaveholder is a tyrant, and are we bound to be bound by *these* acts to aid him in his tyranny?

We are told that we have been sworn to support the constitution, and therefore must support it. Yes, the whole of it,—just as it stands, with this amendment as part of it; repealing as it does, and was intended to do, every thing that in any other part of the Constitution is inconsistent with its true intent and meaning; its letter, and its life and power.

The power to surrender a fugitive slave is conditional; it may be carried into effect, provided it does not impair any man's religious liberty. Both these clauses were adopted by the slaveholding States. They wanted the clause for the surrender of their slaves, and afterwards that sustaining religious liberty; both were granted them. If it be said that this liberty is secured in all cases, except that of the rendition of fugitive slaves, then I reply that the exception destroys the rule. The whole of religious liberty is guaranteed, or none. As well might it be claimed that the early Christians were not deprived of this right, because they were only required to worship an idol, and in all other respects were free; that Daniel was required only to abstain from public prayer for forty days; the apostles only from the public preaching of the resurrection of Christ from the dead. Religious freedom cannot exist at all, except as a whole. It requires the whole heart and spurns a divided empire.

Congress has no more right to make the people of the United States acknowledge the *rightfulness of slaveholding* than it has to make them acknowledge the supremacy of the Pope. If the one is contrary to this amendment, so to, and for the same reason, is the other.

A man has as good a right to believe that "*man cannot have property in man*," as he has to believe in the immortality of the soul. The first doctrine is the necessary and inevitable result of the last. Man is immortal; and therefore was created "to glorify God and enjoy HIM forever;" and therefore he can no more (rightfully) be made a slave, than he can rightfully be discharged from the duties that God requires of the whole race of man—to love God supremely, and his neighbor as himself. The duty to do this carries with it the *right* to do it.

Duty and right are but different words for the same thing, when viewed in different relations. The duty, is the internal act—the right, the external means of doing it. The terms are correlative, and the one implies the other. Every man, then, in the world has the right to obey all the commandments of God;—but the slave can not do so except by the permission of his master; therefore, slavery is as certainly wrong; a sin, as that God is the Creator of the world,—and its King.

"*To deliver up*," is a clear and direct acknowledgement of the *right* of the person to whom he is delivered up—to RECEIVE him—and to HOLD him; and when such delivery is made by judicial proceedings as it adds to the solemity of the sacrifice; so, too, does it give the highest sanction to the right to *receive* it.

It is not the officers of the law only who are implicated in this sin, and all others blameless,—these officers are but the agents, and the delivering up is made by the people of the United States, whose agents they are; made by the people; the whole people—acting by and through their duly authorized and empowered attorneys in fact, and agents.

Slaveholding is wrong. The whole people of the State of Ohio, have emphatically declared it to be so, by the most solemn act, and in the most solemn manner that they can make such a declaration. They did so in 1802, and after nearly fifty years reflection, assembled in convention, with their opinions unchanged and unshaken, and re-enacted the clause of their constitution, which forbids it.

They have given a more solemn declaration of their opinions against slavery than they have against murder, or perjury, or any other crime. These were left to be condemned by the legislature. This great towering, crowning sin of sins, is condemned in the *Constitution* of the State.

The only sin that the constitution of Ohio condemns, is the one which by these acts of Congress this same people are required to support, to endorse, to encourage, to sustain, to declare to the world that it is no sin, but right.

The introduction to the Constitution of the United States is:

"We, the people of the United State, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution, for the United States of America."

"The *Blessings of Liberty.*" Liberty is then a blessing. But *Slavery* is the opposite of Liberty, and is, therefore, a *curse.*

You may call the slave system what you please; a curse or a sin, or merely a wrong; if it is either of these no man can be *compelled* to take part in any other man's sins, or curses, or wrong-doing, unless, indeed, by the utter destruction of this amendment to the Constitution.

There are men who do believe that the African slave trade is piracy; that he who engages in it deserves to die upon the gallows. But it is not wrong, because the law denounces it as piracy; it was wrong before the law was passed, and will be wrong even if the law should be repealed; wrong from its distinctive nature; and not merely from the manner in which it is conducted.

Now many of these same men do, also, believe that the American slave trade, by the traders of Virginia and Maryland to New Orleans, is as wicked and atrocious as the African slave trade, from Congo to Cuba. But if one of the slaves of a regular trader, escapes from one State into another, these Acts of Congress require all the citizens of the United States to forbear to aid in his flight; and to aid in the recapture of such slave. If the guarantee for religious liberty does not extend to such a case; pray, of what use is it? If these Acts, requiring such conduct, do not nullify this amendment to the Constitution; by what acts can it be nullified?

The Constitution of Ohio, and of all the North-Western States, forbid slaveholding within their limits; because the people who made those Constitutions think slaveholding is wrong. Now if these Acts of Congress compel these same people to aid the slaveholder to recapture his slave, then they do compel the people to take part in a transaction which, in the most solemn manner, they have stated and published to the world to be wrong. Can Congress pass a law, and by it compel a man to do what he believes to be wrong, without depriving him of the right guaranteed by this first amendment? The question is not as to the extent of the wrong, but as to the existence of it in any degree whatever. He cannot, as a Christian, do what he knows is wrong, without violating his religion; and this amendment was made to secure him in the

right of keeping his conscience pure and unspotted from the world.

These Acts interfere with this right of religious liberty in both ways; positively, and negatively. They command us to do what Christianity forbids; and forbid us to do what it enjoins. They command us so to regulate our conduct as to acknowledge by it that slaveholding is right. Legislation never can compel a man to *believe* either one way or the other; all that it can do, is to constrain the outward conduct, and to make men *act*, or forbear to act, as if they believed the theory of the law-makers. In Rome they could not compel a man to believe that it was right to burn incense to the image of Cæsar; in England, to go to the established Church; in Spain, to attend the mass; and when these *acts* were done, or omitted, the legislative will was complied with. So, too, these Acts of Congress require the people of the United States to do the same things; *to act as if they believed slaveholding to be right;* to evince it by their conduct; to surrender to his master the escaping slave; and to forbear to give him aid in his flight. If the citizen will do the one, and forbear to do the other, he may believe as he pleases upon the abstract question of holding slaves. But this *doing*, and this *forbearing*, sustains the whole system in all its parts; just as it is; and that is, contrary to the Christian Religion.

These acts nullify the guarantee of religious liberty, and are void. The guarantee, please observe, is not that a man may *worship* God; or believe as he pleases; it extends much further,—to the "EXERCISE,"—and beyond that too;—to the *free* exercise of the Christian religion. Without this the Constitution never would have been adopted. We have heard a great deal about the compromises of the Constitution. Here they are; reduced to writing in these amendments; every one of them in favor of freedom; either of the people or of the States. The traditional guarantees are all on the side of slavery; all in favor of the general government; not one in favor of the rights of the States.

The Bible requires a man to deliver the slave from his oppressor, to break every yoke, and let him go free; to aid him, and sustain him; and this amendment guarantees his right to do so. These acts require him to recognize the ownership of human flesh and blood; the Bible, to deny and abhor it. The one, to look upon the slave as a piece of property, an article of merchandize; the other, to look upon him as a *brother*. If the one prevails, the other goes down. If the right of the slave-holder is sustained, then the right of the Christian is trampled upon—is overthrown; as far as human power can do so.

The whole matter, then, results in this: if slaveholding; as it now is; as it always has been; as it probably ever will be; with the invariable and natural results of the system; the ignorance it demands and enforces, so that the Bible is a sealed Book, in which the slave is not permitted to read even the name of God, and of Christ; with its degradation of men and women, created in the image of God, to the level of beasts; its forbidding marriage, and its separation of parents from children; its untold and nameless cruelties to its bound and helpless victims; its robbing the laborer of his wages, and driving him against his will to toil; its blighting and withering effect upon every virtue; its parentage of every vice,—is sin; is wrong in any degree, or to any extent, whatever; then any and every act of Congress that commands any citizen, or any man, whether he be a citizen, or a stranger, to aid, or abet, or uphold, or encourage, in any manner, or to any extent whatever, any man to commit this SIN; or to continue in it; is, and must be, null and void; or if not, then this guarantee of RELIGIOUS LIBERTY, in the first amendment, is a sham, and a cheat; is no law; no rule of decision for the judge; no rule of conduct for the citizen; no guarantee of rights to be preserved, protected and defended; and the people of the United States, have no such guarantee in their Constitution. But if it is *law*,—and that it is law, who can doubt,—then all power to make any law, that in any manner whatever, is at all inconsistent with the fullest and freest exercise of religious duty, is by express words, plainly, clearly and purposely taken away, and withheld from Congress. They have no more power to pass a law to compel the people of the United States, directly or indirectly, to recognize the *rightfulness of slaveholding*, or to sustain, directly or indirectly, by their conduct or by their creed, the theory "*that man may have property in man;*" than they have power to compel the same people to deny the immortality of the soul, or the Being of God. He who aids a murderer is as guilty of the blood that is shed as the man that strikes the blow. He who aids a slaveholder, by delivering up to him the fleeing slave; decides that the slave is not entitled to his freedom; and that the master has the right to take him and keep him in bondage; takes the part and side of the slaveholder against the slave; of the oppressor against the oppressed; of the wrong-doer, against the wronged; and is at least, as guilty as the principal offender. He who keeps one grog shop supports and sustains, to the uttermost of his example and power, the whole system of intemperance. And he who delivers up one fugitive slave, supports and sustains the whole system of human bondage, with all its general results.

These Acts of Congress of 1793 and 1850, require and oblige (if they are laws at all) the whole people of the United States to become accessories, both before the fact and after the fact, to the crime and sin of each and every slaveholder in holding in bondage each and every slave. Not one slaveholder is or can be excluded from their provisions; not one slave, who is not required to be "delivered up," if he attempts to escape from his bondage.

George Gordon, by presenting his application for pardon, upon the ground on which it rests, has put it in the power of the President to win for himself, as the Preserver of MAGNA CHARTA and RELIGIOUS LIBERTY, imperishable renown. Seize, then, the glorious prize, while it is within your grasp, and secure to yourself the highest of all earthly honors—the honor of preserving that great charter of liberty, which, at Runnymeade, on Friday, the 19th day of June, in the year of grace one thousand two hundred and fifteen, was wrung by the barons and people of England from King John; and which, even then, was no new law in England, but had been brought over by their forefathers from the deep forests of Germany;—the great law that no man, rich or poor, high or low, noble or ignoble, shall be deprived of his life, or liberty or property, without "*due process of law.*"

But great as is this right, it falls infinitely below that right which, first of all the nations of the earth, was made part of the Constitution of the United States—"Congress shall make no law * * prohibiting the FREE EXERCISE OF RELIGION." The first, provides for man's material nature; the last, for the soul itself; the one, great and inestimable as it is; is for the earth; the other is the golden ladder, that reaches up to the throne of God. To preserve these great rights, you have only to *preserve, protect and defend* the Constitution of the United States.

It was because perilous times might come, in which men might be tempted to shrink from the duty of supporting the Constitution, that those who made it exacted an oath from all the officers of the government to support it. It means to support it in all ways,—by example, and by precept, at all times and in every case. It is easy to swear to support it; it may be perilous to keep the oath.

The President cannot hesitate for a moment to discharge that duty. He must discharge it, even if it should cost him his life to do so. He must support the Constitution

as the supreme law of the land,--and of course hold that all acts of Congress that are "not made in pursuance of it," are void. George Gordon will then be promptly pardoned;—the acts under which he is imprisoned, are null and void; because they are contrary to the Constitution of the United States.

With great respect,

John Jolliffe,

Counsel for Petitioner.

Cincinnati, Ohio, April 3, 1862.